

Message

From: Loris, Nick [Nick.Loris@heritage.org]
Sent: 11/16/2018 11:51:33 PM
To: adm15.arwheeler.email [adm15.arwheeler.email@epa.gov]
Subject: Re: Thank you

Haha any time! Happy to help any way we can.

Nick

> On Nov 16, 2018, at 6:37 PM, adm15.arwheeler.email <adm15.arwheeler.email@epa.gov> wrote:
>
> From one policy nerd to another, thank you for the nice press reaction.
>
> - Andrew wheeler
>
> Sent from my iPhone
>

Nick Loris
Research Manager, Energy and Environment and Herbert and Joyce Morgan Research Fellow
Institute for Economic Freedom
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Message

From: Canyon Brimhall [canyon.brimhall@cei.org]
Sent: 2/15/2019 9:07:51 PM
To: Wheeler, Andrew [wheeler.andrew@epa.gov]
Subject: CEI Report Calls for Elimination of EPA's Flawed Integrated Risk Information System

Stationary - [Plain HTML]



Andrew,

A [new report released](#) by CEI senior fellow Angela Logomasini shows EPA's Integrated Risk Information System (IRIS) has significant problems with methodology, relies on sloppy research, and has been criticized for a lack of transparency. The report, "[EPA's Flawed IRIS Program is Not the Gold Standard: EPA's Integrated Risk Information System Produces Counterproductive Results](#)," calls for IRIS to be shut down and its functions shifted into program offices at EPA.

"Far from being the 'gold standard' for risk assessment, EPA's IRIS has a long history of flawed risk assessments based on faulty research that have led the agency to release counterproductive regulations," said Logomasini. "These flawed regulations, based on IRIS assessments, have a profoundly negative impact on consumers and products Americans rely on in their daily lives. Concerns about IRIS's work and methods have been raised by the Government Accountability Office (GAO), EPA's Office of the Inspector General, Congress, and the National Academies of Sciences. IRIS should be shut down and its functions should be shifted into program offices in EPA, which have more rigorous standards for sound science."

[Report](#)

[CEI press release](#)

[CEI tweet](#)

[CEI Facebook post](#)

Best,

Canyon Brimhall

Government Affairs Manager

[Competitive Enterprise Institute](#)

(O) 202.331.2250

[CEI's Agenda for the 116th Congress](#)

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Message

From: Smythe Anderson [AndersonS@api.org]
Sent: 6/2/2020 3:51:33 PM
To: Wheeler, Andrew [wheeler.andrew@epa.gov]; Hyman, Alana [Hyman.Alana@epa.gov]
CC: Gunasekara, Mandy [gunasekara.Mandy@epa.gov]
Subject: API Meeting Request

Administrator Wheeler,

On behalf of API's member companies, I would like to schedule a call between you and API CEO Mike Sommers to discuss high-priority and timely EPA actions impacting the oil and gas industry.

Please let me know if I can provide additional information related to this request.

Thanks in advance for your consideration.

Smythe

Smythe Anderson

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Message

From: Will Hupman [HupmanW@api.org]
Sent: 1/13/2021 7:11:54 PM
To: Wheeler, Andrew [wheeler.andrew@epa.gov]
CC: Ron Chittim [Chittim@api.org]; Frank Macchiarola [MacchiarolaF@api.org]; Gunasekara, Mandy [gunasekara.Mandy@epa.gov]; Idsal, Anne [idsal.anne@epa.gov]
Subject: API on Small Refinery Exemptions
Attachments: API SRE Letter to EPA (1-13-21)(Final-2).pdf

Dear Administrator Wheeler – Please find attached a letter from API regarding small refinery exemptions. Thank you for your consideration of this matter.

Will Hupman

Will Hupman
Director – Federal Affairs
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American
Petroleum
Institute

Ron Chittim
Vice President
API Downstream Policy
202-682-8167
chittim@api.org

January 13, 2021

Via Electronic and U.S. Mail

The Honorable Andrew Wheeler, Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

Re: 2019 Small Refinery Exemptions

Dear Administrator Wheeler:

There are reports that EPA plans to grant many small refinery exemptions (SREs) submitted by refiners outside of the United States Court of Appeals for the Tenth Circuit's jurisdiction for the Renewable Fuels Program (RFS) 2019 compliance year. The American Petroleum Institute (API) believes that EPA granting these SREs will create an unlevel playing field, which will only serve to exacerbate the competitive distortions among refineries competing in the same marketplace. Furthermore, wholesale exemptions that attempt to make the RFS program workable for some refiners also serve to punish non-exempt refiners who already face challenging RFS compliance obligations. The ongoing issues with the RFS have been structural from the inception of the program, apply to all regulated parties, and need to be addressed on a nationwide basis.

API supports the January 2020 Tenth Circuit holding in Renewable Fuels Association et al. v EPA as it is consistent with Congress's intent when it enacted the RFS. Further, given that the U.S. Supreme Court recently granted certiorari in that case, we believe EPA, as well as obligated parties, would best be served by allowing the Court to determine the proper path forward on SREs. For these reasons, we implore the Agency to reconsider any immediate plans to grant wholesale 2019 SREs. Thank you for your consideration of this matter.

Respectfully,

Message

From: Ben Lieberman [Ben.Lieberman@cei.org]
Sent: 1/30/2020 7:23:11 PM
To: Wheeler, Andrew [wheeler.andrew@epa.gov]
Subject: BBWA-IQA-Response
Attachments: EPA IQA Appeal Response-Final (003).pdf

Ben Lieberman
Senior Fellow
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January 30, 2020

The Honorable Andrew Wheeler
Administrator
Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460
Via e-mail

Dear Administrator Wheeler,

We are writing to inform you that EPA Deputy Assistant Administrator for Environmental Information Vaughn Noga has violated the rules of EPA and OMB concerning the Information Quality Act (IQA). Specifically, in the case of an IQA filing by CEI, he managed and chaired our appeal of a decision that he himself originally made. This is contrary to OMB rules on conflicts of interest and independence of appeals. The inclusion of ineligible people on the appeal panel also violated EPA's own IQA Guidelines.

We submitted an IQA request for correction (RFC) #19001 in November 2018, followed by a request for reconsideration #19001A. Both are related to EPA's 2014 Bristol Bay Watershed Assessment (BBWA) as well as the proposed Bristol Bay Watershed Determination, which was used by the Obama EPA to pre-emptively veto Clean Water Act section 404 permits for the Pebble Mine in Alaska. The initial decision to deny our IQA request for correction was made on August 15, 2019 by Vaughn Noga on the grounds that the Determination had been withdrawn and therefore the Assessment was moot. We appealed that decision on September 25, 2019. On January 15, 2020, Mr. Noga denied our appeal. Noga wrote that pursuant to the IQA a three-member executive panel considered our appeal and denied it. Under OMB rules, Mr. Noga should not have been involved in the appeal process at all, yet he responded to our appeal and chaired the appeal panel. In addition, the two other members of the appeal panel were also not qualified to serve according to EPA's own IQA Guidelines.

OMB rules require that **"the same individuals who opine during the initial response should not participate in the appeals process."** OMB Memorandum issued April 24, 2019. As OMB noted in its Implementation Update 4.5, "To ensure the integrity of the appeals process, agencies should ensure that those individuals reviewing and responding to the appeals request were not involved in the review and initial response to the RFC." *Id.*

Mr. Noga obviously provided the initial response to our request for correction on August 15, 2019 and yet he was also the person "responding to the appeal request." Just being the person responding to our appeal violates the IQA rules, according to OMB. And yet, he did even more than this by chairing the executive panel that reviewed his own decision. OMB rules prohibit Mr. Noga as the initial decision-maker from participating in the appeal process at all. The EPA IQA Guidelines also require that, "When the subject of the RFR originated from a member office, that panel member would be replaced by an alternate AA or RA." EPA Quality Guidelines p. 35. As



Mr. Noga issued the original decision on our request for correction, he should have been replaced with an alternative assistant administrator or regional administrator.

But beyond violating the conflict of interest and independence requirements of the Information Quality Act, as specified by OMB and EPA Information Quality Guidelines, Mr. Noga also chose to include people on the panel who do not have such authority. Under the EPA Information Quality Guidelines, the panel must include the Assistant Administrator for the Office of Research and Development, the Assistant Administrator for the Office of Environmental Information, and the Assistant Administrator for the Office of Policy. EPA Quality Guidelines p. 35. Both the AA of ORD and the AA of OEI are presidentially appointed, Senate-confirmed positions, and the AA of Policy is the highest policy official for EPA. This ensures proper political accountability.

None of these people was actually included in the executive panel as required by EPA Information Quality Guidelines. Instead of a properly constituted panel, we have been informed by EPA that the members of the appeal panel were:

- Lindsey Jones, Senior Advisor, Office of Policy
- Nigel Simon, Director, Office of Program Management, Office of Land and Emergency Management; and
- Vaughn Noga, Deputy Assistant Administrator for Environmental Information, Office of Mission Support

Had Mr. Noga been the acting Assistant Administrator for Environmental Information (and if he had not issued the initial decision requiring his recusal), then it would have been appropriate for him to be on this panel. But Mr. Noga is not, and cannot by law, be the acting Assistant Administrator for Environmental Information. The Federal Vacancies Reform Act of 1998 (FVRA) allows the first assistant to take the acting role of the acting Assistant Administrator for Environmental Information for up to 210 days starting when the vacancy occurs. As reported to the GAO, this vacancy occurred on January 20, 2017. Given that this occurred during the 60 days following the presidential inauguration, pursuant to 5 U.S.C. § 3349a, a 90-day extension of this deadline occurred. The maximum time Mr. Noga could have been the acting Assistant Administrator for Environmental Information would have extended to **November 16, 2017**. As there is currently no lawful acting official, according to the FVRA, “only the head of [the agency] may perform any function or duty of such office.” 5 U.S.C. § 3348(b)(2).

The FVRA further specifies that an “action taken by any person” who is not complying with FVRA, “in the performance of any function or duty of a vacant office . . . shall have no force or effect.” 5 U.S.C. § 3348(d)(1). According to the Supreme Court in *NLRB v. SW General, Inc.*, 137 S. Ct. 929, 938 n.2 (2017), such actions are “void *ab initio*.” This means such actions are automatically void and cannot subsequently be ratified or rendered harmless by ratification by a person with appropriate authority. *Shapleigh v. San Angelo*, 167 U.S. 646, 652 (1897); *Kinwood Capital Group, L.L.C. v. BankPlus*, 614 F.3d 140, 143 (5th Cir. 2010), *FEC v. Legi-Tech*, 75 F.3d 704, 707 (D.C. Cir. 1996).



Neither Mr. Noga nor any other member of this panel had the authority to sit on this panel. Pursuant to EPA IQA Guidelines p. 35, as the Associate Administrator for the Office of Policy, Brittany Bolen would have such authority.

In addition to the above procedural infirmities, the denial of our appeal is substantively invalid. The initial response by Mr. Noga was that our RFC was essentially moot; it stated that EPA's revocation of the Determination supposedly made our request unnecessary and that therefore EPA did not have to investigate whether the BBWA satisfied the IQA. EPA thus waived any response on the merits. Upon our appeal, however, Mr. Noga seems to have concluded that position was untenable since he made absolutely no reference to it. Instead, Mr. Noga introduced arguments based on a 2016 Inspector General report *ex parte* to justify his own initial decision. In introducing this argument after we could possibly respond, he prevented us from providing any explanation in our appeal as to why his new argument fails.

We seek an independent panel to consider our appeal, as required by OMB rules. We request that it consist of appropriate officials as specified in the EPA Information Quality Guidelines. Given the delay that has already occurred as a result of EPA's improper conduct, we also seek expedited consideration and decision of our appeal.

I look forward to your prompt reply.

Sincerely,

Ben Lieberman
Competitive Enterprise Institute
1310 L Street, NW, 7th Floor
Washington, DC 20005

cc: Matthew Leopold, General Counsel, Environmental Protection Agency

Ryan Jackson, Chief of Staff, Environmental Protection Agency

Brittany Bolen, Associate Administrator for the Office of Policy, Environmental Protection Agency

Sean O'Donnell, Inspector General, Environmental Protection Agency

Russ Vought, Acting Director, Office of Management and Budget

Derek Kan, Executive Associate Director, Office of Management and Budget

Margo Schwab, Office of Information and Regulatory Affairs, Office of Management and Budget.

Message

From: David Lax [Lax@api.org]
Sent: 9/8/2020 8:49:03 PM
To: Wheeler, Andrew [wheeler.andrew@epa.gov]
CC: Tsirigotis, Peter [Tsirigotis.Peter@epa.gov]; Lassiter, Penny [Lassiter.Penny@epa.gov]; Shine, Brenda [Shine.Brenda@epa.gov]
Subject: RE: API/AFPM Request for Administrative Reconsideration of EPA's "National Emissions Standards for Hazardous Air Pollutants: Organic Liquid Distribution (non-gasoline) Residual Risk and Technology Review; Final Rule"
Attachments: API-AFPM OLD Petition for Reconsideration 9-8-20.pdf

Dear Administrator Wheeler,

Please see the attached document submitted jointly by the American Petroleum Institute and the American Fuel & Petrochemical Manufacturers. We are requesting the U.S. Environmental Protection Agency to reconsider certain aspects of the regulation entitled "National Emissions Standards for Hazardous Air Pollutants: Organic Liquid Distribution (non-gasoline) Residual Risk and Technology Review; Final Rule", published at 85 Fed. Reg. 40,407 (July 7, 2020).

Sincerely,

David Lax

David Lax

Policy Advisor, Policy, Economics and Regulatory Affairs
office: 202.682.8479
lax@api.org

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Washington, DC 20001

www.api.org



American
Petroleum
Institute



American
Petroleum
Institute



Via email

September 8, 2020

The Honorable Andrew Wheeler, Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Re: Request for Administrative Reconsideration of EPA's *"National Emissions Standards for Hazardous Air Pollutants: Organic Liquid Distribution (non-gasoline) Residual Risk and Technology Review; Final Rule"* 85 Fed. Reg. 40,407 (July 7, 2020)

Dear Administrator Wheeler:

The American Petroleum Institute ("API") and the American Fuel & Petrochemical Manufacturers ("AFPM") hereby request that the U.S. Environmental Protection Agency ("EPA" or "Agency") reconsider certain aspects of the regulation entitled *"National Emissions Standards for Hazardous Air Pollutants: Organic Liquid Distribution (non-gasoline) Residual Risk and Technology Review; Final Rule"* (OLD RTR), published at 85 Fed. Reg. 40,407 (July 7, 2020). Pursuant to section 307(d)(7)(B) of the Clean Air Act ("CAA"), 42 U.S.C. § 7607(d)(7)(B), where it is impracticable to raise an objection during the period of public comment or if the grounds for such an objection arise after the public comment period (but within the time specified for judicial review), and if such objections are of central relevance to the outcome of the rule, EPA is authorized to reconsider a rule. For the reasons specified in the attached document, the OLD RTR Final Rule merits reconsideration.

API represents nearly 600 oil and natural gas companies, leaders of a technology-driven industry that supplies most of America's energy, supports more than 9.8 million jobs, and, since 2000, has invested nearly \$2 trillion in U.S. capital projects to advance all forms of energy, including alternatives. Many of our members own and/or operate petroleum refineries and/or terminals and, thus, will be directly impacted by this final rule.

AFPM is a trade association representing most U.S. refining and petrochemical manufacturing capacity. Its members produce the fuels that drive the U.S. economy and the chemical building blocks integral to millions of products that make modern life possible. AFPM members own and/or operate petroleum refineries, petrochemical manufacturing facilities and/or terminals and, thus, will be directly impacted by the final rule.

We appreciate the hard work that EPA has put into understanding our operations throughout the development of this lengthy and complex rule. While the final rule is much improved from the proposal, several issues remain. However, in hopes of facilitating EPA's consideration and the identification of an

The Honorable Andrew Wheeler

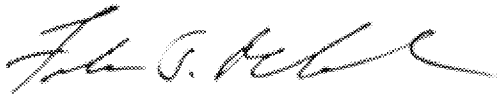
September 8, 2020

Page 2

expeditious solution, we are submitting this request for reconsideration on the issues identified in the attachment. While these issues have immediate implications for our members' ability to comply with the final rule, they have little to no effect on the protectiveness of the standard.

Thank you for your consideration of this request for administrative reconsideration. Please do not hesitate to have your staff contact David Lax, lax@api.org, (202.682.8479) or David Friedman, dfriedman@afpm.org, (202.844.5508) if you have questions or need more information.

Sincerely,



Frank Macchiarola
Senior Vice President
Policy, Economics & Regulatory Affairs
American Petroleum Institute



David Friedman
Vice President
Regulatory Affairs
American Fuel & Petrochemical Manufacturers

Att/

cc:

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Office of Air and Radiation
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Penny Lassiter
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Attachment 1

API/AFPM Organic Liquid Distribution (OLD) RTR Reconsideration Issues

1. Planned routine maintenance should be allowed for OLD fixed roof storage tanks where level increases cannot be totally avoided while maintenance is being performed, whether a CVS and control device is used (§63.2378(e)(3)) or the tank vapors are routed to fuel gas or a process (§63.2378(e)(4)).

Discussion: As exemplified in the comments on the OLD RTR amendment proposal submitted by Alyeska Pipeline Service Company¹, there are some situations where it is not possible to prevent level increases in tanks during all situations where maintenance on the vapor control system is necessary to reduce the risk of unplanned failures or loss of control efficiency. Their Valdez Marine Terminal (VMT) includes fourteen atmospheric storage tanks controlled by a common vapor control system. As described in their comments, the VMT vapor control system integrates tank vapor control, loading vapor control and power generation into one system. The VMT must generate their own power because there are no utility sources in the area that provide sufficient power for the VMT. Because of this integration, the narrow operating range of the tanks, the lack of back-up utilities or temporary control devices and the fact that crude deliveries from the Trans Alaska Pipeline are continuous except for very limited circumstances, releases during planned maintenance activities on the vapor control system could include working losses from tank level rises.

Other API members indicate that there are a limited number of cases where processes or pipelines continuously flow to OLD tankage and those processes or pipelines would have to be shutdown to prevent level increases during planned control system maintenance outages. Use of temporary control devices is possible in some of these situations, but often is not, since (a) temporary controls or alternative dispositions are not readily available in some locations, (b) OLD and permit requirements impose extensive cost and burden barriers to use of temporary controls (see items 3 and 4 below), and (c) the combustion and other emissions from the temporary control system could offset the few hours of tank vent control reduction typical for these short outages. Furthermore, temporary controls may not even be available at the time of the control reduction because of previous commitments and/or the extensive lead-time required to obtain regulatory permit approvals, meet applicable closed vent system and control device requirements, and install the control devices as well as their associated utilities and safety systems.

The OLD rule ban on level increases in these limited cases will result in emission increases from unplanned equipment failures or from unnecessary process or pipeline shutdowns and restarts. While §63.2378(e)(3) and (4) allow for 240 hours a year of reduced control, in most cases only a small portion of that time is needed. Thus, we recommend the ban on level increases be modified to allow such increases for a portion of the 240 hours and with appropriate records and reporting to demonstrate that there was no reasonable option to avoid the level increase.

¹ EPA-HQ-OAR-2018-0074-0061, "Comments on the Proposed Amendments to the Organic Liquids Distribution (Non-Gasoline) Rule (84 FR 56288)," December 5, 2019

In the OLD RTR Response to Comments² the level increase ban is justified as follows:

We are finalizing a standard that would limit the amount of time that a closed vent system and control device could be offline for a planned maintenance event (240 hours per year) with the additional constraint of not allowing tanks to be filled during this time. As we stated in the preamble to the proposed rule, the removal of the 240-hr exemption provisions except for tank breathing losses was based upon the position that removal is needed to satisfy *Sierra Club v. EPA*, 551 F. 3d 1019 (D.C. Cir. 2008).

API and AFPM understand the need to comply with this Court decision but believes a different work practice standard can be applied during this situation to satisfy the continuous standard concern. We recommend an alternative work practice to the current work practice of not allowing a level increase when a level increase during these reduced control periods is unavoidable. That alternative work practice should require that the duration and magnitude of any working loss emissions be minimized. Reporting and recordkeeping should be required to document the amount of working loss emissions, the need for allowing the level increase, an explanation why delaying the maintenance or using a temporary control is impractical, and the steps taken to minimize the working loss release.

Recommendation: Allow tank levels to be increased where there is no reasonable alternative during fixed roof tank closed vent system or control system maintenance outages. Require that the duration and the magnitude of the working losses be minimized, and that this information and the steps taken to minimize the working losses be reported.

2. The applicability of the degassing requirements should be clarified.

Discussion: Paragraph 63.2346(a)(6) imposes tank degassing control requirements and specifies:

Beginning no later than the compliance dates specified in §63.2342(e), tank emissions during storage tank shutdown operations (i.e., emptying and degassing of a storage tank) for each storage tank at an affected source storing organic liquids that meets the tank capacity and liquid vapor pressure criteria for control in Table 2 to this subpart, items 3 through 6 or Table 2b to this subpart, items 1 through 3, you must comply with paragraphs (a)(6)(i) through (iii) of this section during tank emptying and degassing until the vapor space concentration in the tank is less than 10 percent of the lower explosive limit (LEL). ...

Table 2b will replace Item 1 of Table 2 when the compliance date arrives. However, existing tanks meeting the requirements of Table 2 Item 2 are not addressed by §63.2346(a)(6) and it therefore appears those storage tanks are not subject to the degassing control requirements. Table 2 Item 2 addresses storage tanks at an existing affected source with a capacity ≥189.3 cubic meters (50,000 gallons), storing crude oil or condensate or an organic liquid that is not crude oil or condensate that has

² EPA-HQ-OAR-2018-0074-0075, "Summary of Public Comments and Responses for the Risk and Technology Review for Organic Liquids Distribution (Non-Gasoline)," March 2020, page 91

an annual average true vapor pressure of the total Table 1 organic HAP in the stored organic liquid of <76.6 kilopascals (11.1 psia).

Recommendation: The applicability of §63.2346(a)(6) to Table 2 Item 2 storage tanks should be clarified.

3. In the final OLD RTR amendments, tank degassing control requirements were applied to the shutdown and start-up of floating roof tanks, without an opportunity for impacted sources to comment on the justification for such control and it was erroneously assumed requirements applicable to shutdown of fixed roof tanks are feasible for floating roof tanks. A public comment opportunity is required to address EPA's justification for degassing controls for floating roof tanks and the specifics of any justifiable degassing requirements. If degassing control is justified, revisions to the current requirements are necessary to make them feasible for floating roof tanks.

Discussion: When a storage tank is shutdown, it must be drained of liquid and residual vapors must be removed to allow entry into the tank. The amended OLD rule now provides that the startup and shutdown vapors be controlled, except when the vapor space has a Lower Explosive Limit (LEL) of $\leq 10\%$. This provision was added between the proposal and final rule amendments "Based on comments received on the proposed rulemaking ..." ³ However, the comments in the record, including those by API and AFPM, only address degassing of fixed roof tanks and, thus, comments on potential degassing requirements for floating roof tanks were not requested or received. This deficiency should be addressed by notice and comment rulemaking focused on this specific issue. To assure adequate compliance time for changes, this rulemaking should occur as expeditiously as possible.

Docket document EPA-HQ-OAR-2018-0074-0070⁴ explains the basis for the new OLD degassing requirements. That memorandum concludes that there are 891 tanks in the OLD source category and 637 of those are controlled with floating roofs. Potential emission impacts of the degassing requirements are made using emission estimates derived for ethylene MACT storage tanks and applying those values to the anticipated number of OLD tanks to be degassed each year that are not already subject to State degassing control requirements. It is also estimated, based on the ethylene MACT analysis, that each degassing event generates 1744 lb. of HAP (prior to any control) resulting in approximately 74 T/year of HAP reduction with an assumed 95% degassing control. Appendix A of that memorandum provides the emission calculation information. However, because the vessel volume information for the ethylene tankage is considered confidential, it is impossible to distinguish the estimated vent emissions from floating roof tanks versus those from fixed roof tanks. For floating roof tanks, it is only the tank volume below the floating roof, when it is set down on its legs, that must be controlled. This is typically, less than 20% of the volume of an equivalent fixed roof tank. Thus, the potential degassing emissions, both before and after any control, are <20% of the potential emissions for the equivalent fixed roof tank and the cost/benefit ratio for degassing control will be at least a factor of 5 less favorable for control of floating roof degassing.

³ 85 Fed. Reg. 40745 (July 7, 2020), Center column.

⁴ EPA-HQ-OAR-2018-0074-0070, "Tank Degassing Analysis for the Organic Liquids Distribution (Non-Gasoline) Source Category Final Rule," March 5, 2020

Recommendation: EPA should immediately undertake notice and comment rulemaking to address shutdown and start-up of floating roof tanks subject to the OLD rule (and perhaps other newly amended rules with similarly inadequate records) and to specifically obtain comment on the justification for and the specifics of the degassing provisions finalized for floating roof tanks in the OLD rule on July 7, 2020.

The failure to have an opportunity to comment is of central relevance to API and AFPM. If we had had a opportunity to comment, we would have noted that the OLD rule imposes part 63 subpart WW on floating roof storage tanks. Paragraph 63.1063(b)(2) of subpart WW addresses the refilling (i.e., the start-up) of a floating roof tank, requiring “When the storage vessel is storing liquid, but the liquid depth is insufficient to float the floating roof, the process of filling to the point of refloating the floating roof shall be continuous and shall be performed as soon as practical.” This is the same work practice as imposed by Texas⁵ for storage tank start-ups and thus OLD, via subpart WW, already adequately addresses floating roof tank startup. However, nothing in subpart WW appears to address the emptying of the tank to allow the tank to be degassed to control as now required by OLD (and other newly amended rules).

After a floating roof sets down on its legs and the liquid is pumped out of the tank, some tank manways are typically removed and replaced with cleaning nozzles, purge gas connections and connections to allow the vapor remaining in the tank under the floating roof to be routed to the atmosphere or to a control device⁶. In some cases, in addition to draining the liquid that had been stored in the tank, residual liquid and/or sludge is further removed by washing with heavy hydrocarbon such as diesel fuel. Furthermore, depending on the stored liquid and the amount of residual liquid and sludge, it is sometimes possible to minimize the hydrocarbon content of the vapor space under the floating roof to a level that avoids the need for vapor control with a heavy hydrocarbon wash. Installing facilities to allow this washing step often requires the type of manway opening and replacement discussed above. The Texas work practice allows for this approach and it should be included as part of the OLD floating roof tank work practice to make the work practice feasible.

Existing shutdown plans and the Texas rules allow for the required shutdown activities by not requiring venting associated with these preparatory actions to be controlled. They do require minimization of emissions from the floating roof vents and manway openings during these activities by imposing a work practice to minimize the time between roof landing and instituting control. Since the vapor space of a drained floating roof tank is at only a few inches of water pressure above atmospheric, there is an insignificant amount of emission potential associated with replacing blank manways with manway covers containing piping connections, nozzles and valves. Attachment 1A quotes the relevant portions of a typical Texas permit that specifies the floating roof tank work practice.

⁵ The record indicates that the OLD degassing control requirements are based on Texas requirements.

⁶ These connections are not permanent for a floating roof tank, because protuberances into the tank could interfere with the floating roof operation and because the safety and environmental risk and fugitive emissions associated with such permanent connections outweighs the small amount of emissions that occurs from a once every ten-year shutdown event.

Recommendation: EPA should remove or revise the requirements applicable to OLD floating roof storage tank shutdowns based on comments received in response to a new request for comments. §63.2346(a)(6) should be amended to provide a work practice requirement applicable to the time period between landing a floating roof for the purpose of degassing a tank and initiation of degassing to control that is based on the Texas work practice approach outlined in Attachment 1A and allowing opening of manways as needed to add connections to allow washing, draining, cleaning and/or connection of degassing controls.

4. Requiring an initial compliance demonstration before every use for a temporary storage tank control device is unnecessary and unreasonable.

Discussion: §63.2346(a)(6) specifies the requirements for degassing a storage tank. After removing as much liquid as possible you must degas until 10% LEL is achieved, while complying with the fixed roof control requirements in Table 2 or 2b Item 1.a.i or 1.a.ii (route to control) or the requirements in Table 4 Item 1b (route to fuel gas or process). These are the same requirements applicable to a permanent control system on a fixed roof tank. Paragraph 63.2358 of the amended OLD rule appears to require an initial compliance demonstration when a control device is used to control storage tank emissions for the first time. Presumably, that means a new demonstration is required each time a temporary control device is used on a different tank. For instance, it appears OLD requires a new initial compliance demonstration if a control device has been used for two weeks on one tank and is then moved to another tank for another two week use, whether the new tank is at the same facility or at another facility.

The same concern applies to temporary control devices used to allow for maintenance of a fixed roof tank control system where the new ban on level increases cannot be met during the maintenance activity or where an owner or operator opts not to use the planned routine maintenance provisions. Since the service is essentially the same as when used for degassing and the same temporary controls are typically deployed as are used for degassing, initial compliance testing for these uses are also unjustified. OLD and other rules with degassing and/or planned routine maintenance provisions should be encouraging the use of temporary controls, not discouraging their use by imposing unnecessary burdens and costs.

It is unreasonable and unnecessary to require multiple initial compliance demonstrations a year for every temporary control device used for tank vapor control. Furthermore, the record does not reflect any costs or burdens (or emission reductions) for any OLD degassing control system compliance demonstrations. Since the Texas degassing requirements are cited by EPA as the basis for the OLD requirements, we recommend Texas initial compliance demonstration requirements be the basis for the requirements for any storage tank temporary control device under OLD. Specifically, we recommend an initial and every 5-year compliance demonstration for the control device be the basis for performance testing or design evaluations as in 30 TAC 115.544(c)(2), regardless of how many tanks the control device is used for during that 5-year period. This system has proven highly effective in Texas. Typically, the owner of the control device has a design evaluation or performance test done that demonstrates the device achieves the required control and the control device owner provides a copy of that analysis

to each tank operator for their records. In the Response to Comments⁷, EPA agrees that a temporary degassing control device is typically used for 1-10 days and that previous compliance demonstrations may be relied upon. However, use of a previous compliance demonstration still requires permitting authority approval for every use. Having to get such approval multiple times per year per control device is a large and unnecessary diversion of permitting authority and owner resources and extends the lead time needed.

The rulemaking record does not reflect exceeding the Texas requirements. The degassing analysis memo in the docket⁸, the general rule burden and cost analyses and the Paperwork Reduction Act Information Collection Request Supporting Document all assume no additional cost or burdens for storage tanks in Texas or California due to the new OLD degassing requirement. Nor do they reflect the costs and burdens for initial performance tests or design evaluations for temporary use to allow fixed roof tank control system maintenance in any location. Thus, the Texas requirement (one initial compliance demonstration every 5 years) is the basis in the record for the OLD RTR amendments. Since there are no emission reductions associated with tanks in Texas or California, there is certainly no justification for imposing large additional burdens and costs. Nor does it seem reasonable to assume that any additional testing to that used in Texas would make sense for storage tanks in other jurisdictions. In the degassing analysis memorandum Appendix (pages 4 and 5), no costs or burdens for even a once every 5-year compliance test or their submission or review is included. The only cost considered was for an estimated 10.5 hours of operation of a thermal oxidizer per degassing event.

Recommendation: A compliance demonstration for temporary control devices used for tank degassing and during maintenance of a fixed roof tank control system should be required no more often than initially and once every five years, thereafter. A record of the compliance demonstration should be required to be maintained by the tank owner or operator. 30 TAC 115.544(c)(2) should serve as the model for this new provision.

Additionally, EPA should clarify that the exceptions from the initial compliance testing for non-flare control devices in §63.985(b)(2)⁹ of subpart SS apply to temporary control devices and that the allowance for previous evaluations in §63.985(c) applies to the temporary control device, not storage tank by storage tank as it is currently drafted.

Recommendation: Clarify the initial compliance testing exemptions at §63.985(b)(2) are applicable to temporary control devices and how the previous evaluation provision at §63.985(c) applies.

⁷ Op. Cit., page 93

⁸ EPA-HQ-OAR-2018-0074-0070 “Tank Degassing Analysis for the Organic Liquids Distribution (Non-Gasoline) Source Category Final Rule,” Eastern Research Group, March 5, 2020

⁹ §63.985(b)(2) *Exceptions*. A design evaluation or performance test is not required if the owner or operator uses a combustion device meeting the criteria in paragraph (b)(2)(i), (ii), (iii), or (iv) of this section. (i) A boiler or process heater with a design heat input capacity of 44 megawatts (150 million British thermal units per hour) or greater. (ii) A boiler or process heater burning hazardous waste for which the owner or operator meets the requirements specified in paragraph (b)(2)(ii)(A) or (B) of this section. (A) The boiler or process heater has been issued a final permit under 40 CFR part 270 and complies with the requirements of 40 CFR part 266, subpart H, or (B) The boiler or process heater has certified compliance with the interim status requirements of 40 CFR part 266, subpart H. (iii) A hazardous waste incinerator for which the owner or operator meets the requirements specified in paragraph (b)(2)(iii)(A) or (B) of this section. (A) The incinerator has been issued a final permit under 40 CFR part 270 and complies with the requirements of 40 CFR part 264, subpart O; or (B) The incinerator has certified compliance with the interim status requirements of 40 CFR part 265, subpart O; or (iv) A boiler or process heater into which the vent stream is introduced with the primary fuel.

5. It is unnecessarily burdensome to regulators and the regulated to apply all the monitoring and burden requirements specified for permanent control devices to temporary storage tank controls.

Discussion: §63.2346(a)(6) specifies the requirements for degassing a storage tank. After removing as much liquid as possible you must degas until 10% LEL is achieved, while complying with the fixed roof control requirements in Table 2 or 2b Item 1.a.i or 1.a.ii or the requirements in Table 4 Item 1b (route to fuel gas or process). For both the closed vent system and the control device, all the requirements applicable to permanent fixed roof control systems apply. Essentially, then a temporary control device must comply with part 63 subpart SS monitoring requirements.

These devices are typically used from 1-10 days and, as for initial compliance testing as discussed previously, obtaining approvals of monitoring plans every time a temporary control is relocated to another tank is unnecessary and wasteful. Nor is it sensible to tie up permitting authority and company resources multiple times a year to submit, review and approve essentially the same information, just because the portable control device was moved from one tank to another. As for initial compliance testing, none of the costs or burdens associated with these reviews or with initial continuous monitor compliance demonstrations are reflected in the record. Furthermore, §63.2366(b) through (d) of OLD require monitoring plan submittals in a Notice of Compliance Status (NOCS), which adds additional burden and will not be timely, since NOCS submissions are not required until long after the temporary control device has moved on (i.e. 150 days after start-up).

Relief is needed from the current rule requirement of having to submit multiple monitoring plans per year (each time the temporary device is moved to a different tank) and with having to submit any of this information as an NOCS submission. Rather we recommend a monitoring plan submission be made with each compliance demonstration (i.e., initially and every five years thereafter) and that the tank owner or operator only be required to maintain a record of the monitoring plan and design evaluation or performance test report, as provided by the control device owner and, of course, to comply with the monitoring plan when regulated material is routed to the control device. This is the approach used by Texas and it has proven effective.

Recommendation: Clarify and simplify the OLD monitoring requirements as applicable to temporary storage tank control devices and do not require repeated submissions of compliance evaluation information and monitoring plans for every use of a temporary control device. Do not require any of this information to be submitted through an NOCS notice or update.

6. In the final OLD rule, the existing §63.2346(i) allowance that “Opening of a safety device is allowed at any time that it is required to avoid unsafe operating conditions” only applies until July 7, 2023. With the removal of §63.2346(i) and the SSM provisions, the OLD rule will become unique in putting at risk the integrity of atmospheric tankage. Most other tank regulations provide integrity protection for storage tanks by excluding tank relief devices with a 2.5 psig or lower setpoint from the definition of a pressure relief device (PRD).

Discussion: Because safe operation of petroleum and chemical facilities is a primary concern, virtually all equipment in those facilities is protected by PRDs. While many of these PRDs are routed to control, some cannot be. For instance, the release pressure of a fixed roof storage tank PRD is so low and the release is so diffuse as to be unable to be collected and released to a control system without risking a tank rupture due to control and collection system backpressure or failure. For this reason, most rules exclude from their PRD definition relief devices with a set pressure below 2.5 psig. However, the original OLD rule had no such exclusion. Instead the original OLD regulation addressed this concern by including the broader language in §63.2346(i), that specifically allows releases from safety devices when necessary to protect equipment integrity.

The amended OLD rule disallows releases from tank conservation vents¹⁰ that are acting as, and meeting the definition of, a PRD after July 7, 2023. In the Response to Comments¹¹ it is stated that conservation vents should be routed to vapor control on a controlled tank. However, that is not technically feasible, practical or safe whether the conservation vent is operating normally on an uncontrolled tank or serving as a PRD on a controlled tank because of the low pressure and because of the design of conservation vents.

In a properly operating tank control system vapors from unloading into an atmospheric tank and breathing vapors will be controlled and conservation vents serving as PRDs will not release. However, these devices must be able to immediately and fully release should that be necessary. Failure of the conservation vents to respond fully to even a few inches of water overpressure increase can be catastrophic.

Another alternative approach to assuring tank integrity is not compromised would be to establish a work practice like the PRD provisions that were provided in the Refinery Sector Rule amendments at §63.648(j)(3). This work practice approach would ensure appropriate monitoring and reporting of relief vent opening events as well as limiting the frequency of releases due to repeat root causes. This alternative approach ensures on-going Agency insight into these types of events and incentivizes minimizing their occurrence. Such an alternative approach would be especially useful for sites in remote or unique locations where there are difficult challenges due to weather, access, and vent gas recovery options.

Recommendation: In order to assure the structural integrity of OLD atmospheric tanks while narrowing the current safety relief allowance in §63.2346(i), exclude from the definition of pressure relief device, relief devices with a set pressure of 2.5 psig or less. Alternately, provide a work practice approach for OLD PRDs, like that in §63.648(j)(3).

¹⁰ A conservation vent is an extremely low-pressure device that opens at a few inches of water pressure to protect the structural integrity of an atmospheric tank. Typically, they also open to protect the tank integrity by allowing air or inert into a tank should a slight vacuum occur. While conservation vents are designed for continuous use on uncontrolled fixed roof tanks, on a controlled tank they serve as safety devices should the control system be unable to maintain the tank pressure at the required very low level.

¹¹ Op. Cit., page 85

Attachment 1A

Typical Texas Permit Requirements for Degassing Activities for a Floating Roof Storage Tank

A. The tank liquid level shall be continuously lowered after the tank floating roof initially lands on its supporting legs until the tank has been drained to the maximum extent practicable without entering the tank. Liquid level may be maintained steady for a period of up to two hours if necessary, to allow for valve lineup and pump changes necessary to drain the tank. This requirement does not apply if the VOC vapor under a floating roof is routed to a control device or a controlled recovery system during this process.

B. If the VOC partial pressure of the liquid previously stored in the tank is greater than or equal to 0.044 psia at 68°F, tank refilling or degassing of the vapor space under the landed floating roof must begin within 24 hours after the tank has been drained unless the vapor under the floating roof is routed to a control device or a controlled recovery system during this period. Controlled degassing of the vapor space under landed roofs shall be completed as follows:

- (1) Any gas or vapor removed from the vapor space under the floating roof must be routed to a control device or a controlled recovery system, and controlled degassing must be maintained until the VOC concentration before the inlet to the control device or controlled recovery system is less than 10,000 ppmv or 10 percent of the LEL. The locations and identifiers of vents other than permanent roof fittings and seals, control device or controlled recovery system, and controlled exhaust stream shall be recorded. There shall be no other gas/vapor flow out of the vapor space under the floating roof when degassing to the control device or controlled recovery system.
- (2) The vapor space under the floating roof shall be vented using good engineering practice to ensure VOC vapors are flushed out of the tank through the control device or controlled recovery system to the extent allowed by the storage tank design.
- (3) A volume of purge gas equivalent to twice the volume of the vapor space under the floating roof shall be passed through the control device or into a controlled recovery system before the vent stream may be sampled to verify acceptable VOC concentration. The measurement of purge gas volume shall not include any make-up air introduced into the control device or recovery system.
- (4) The sample ports and the collection system must be designed and operated such that there is no air leakage into the sample probe or the collection system downstream of the process equipment or vessel being purged.
- (5) Degassing must be performed every 24 hours unless there is no standing liquid in the tank or the VOC partial pressure of the remaining liquid in the tank is less than 0.15 psia.

C. The tank shall not be opened except as necessary to prepare for degassing and cleaning, or ventilated to the atmosphere without control, until either there is no standing VOC liquid in the tank or the liquid in the tank has a VOC partial pressure less than 0.02 psia. [Underline emphasis added]

- (1) Low VOC partial pressure liquid that is soluble with the liquid previously stored may be added to the tank to lower the VOC partial pressure of the liquid mixture remaining in the tank to less than 0.02 psia. This liquid shall be added during tank degassing if practicable. The estimated volume of liquid remaining in the drained tank and the volume and type of liquid added shall be

recorded. The liquid VOC partial pressure may be estimated based on this information and engineering calculations.

- (2) If water is added or sprayed into the tank to remove standing VOC liquid, one of the following must be demonstrated:
 - (a) Take a representative sample of the liquid remaining in the tank and verify no visible sheen using the static sheen test from 40 CFR Part 435 Subpart A, Appendix 1.
 - (b) Take a representative sample of the liquid remaining in the tank and verify hexane soluble VOC concentration is less than 1,000 ppmw using EPA Method 1664 (may also use 8260B or 5030 with 8015 from SW-846).
 - (c) Stop ventilation and close the tank for at least 24 hours. When the tank manway is opened after this period, verify VOC concentration is less than 1,000 ppmv
- (3) No standing VOC liquid is verified through visual inspection.

Records shall be maintained to document the method used to release the tank under Paragraph C of this special condition.

Message

From: Cathe Kalisz [kaliszc@api.org]
Sent: 11/16/2020 8:45:06 PM
To: Wheeler, Andrew [wheeler.andrew@epa.gov]
CC: Tsirigotis, Peter [Tsirigotis.Peter@epa.gov]; Cozzie, David [Cozzie.David@epa.gov]; Marsh, Karen [Marsh.Karen@epa.gov]; Fruh, Steve [Fruh.Steve@epa.gov]
Subject: NSPS OOOOa Technical Rule - Petition for Administrative Reconsideration
Attachments: OOOOa Tech. Amendments - Petition for Reconsideration 11.16.20.pdf

Please see the attached petition for administrative reconsideration.

Cathe Kalisz, P.E.
Senior Policy Advisor
Upstream Policy

o: 202.682.8318
e: kaliszc@api.org

www.api.org



November 16, 2020

Via email

The Honorable Andrew R. Wheeler, Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

RE: Request for Administrative Reconsideration of EPA's "Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Reconsideration"; Final Amendments

Dear Administrator Wheeler:

The American Petroleum Institute ("API") hereby submits this petition for administrative reconsideration of the final technical amendments rule entitled "Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Reconsideration," published at 85 Fed. Reg. 57398 (September 15, 2020) ("Subpart OOOOa").

Pursuant to section 307(d)(7)(B) of the Clean Air Act ("CAA"), 42 U.S.C. § 7607(d)(7)(B), where it is impracticable to raise an objection during the period of public comment or if the grounds for such an objection arise after the public comment period (but within the time specified for judicial review), and if such objections are of central relevance to the outcome of the rule, the U.S. Environmental Protection Agency ("EPA" or "Agency") is required to reconsider a rule. As explained more fully in the attachment to this letter, the new restriction that semiannual leak detection and repair (LDAR) monitoring surveys for well sites and compressor stations must be conducted no more than 7 months apart meets the criteria for reconsideration.

In addition, while we appreciate the improvements to the recordkeeping provisions of the rule, API believes that the rule can be further improved by EPA revising the expanded information required to be recorded and reported in the deviation reports for all of the affected facility source types. Expanded deviation information records kept by the facility should not have to be duplicated in annual reports. While this provision was proposed, we believe, as explained more fully in the attachment, that this requirement provides additional burden to facilities without additional environmental benefits, and the rule could be improved by removing this section.

API represents all segments of America's oil and natural gas industry. Our more than 600 members produce, process and distribute most of the nation's energy. The industry supports more than ten million U.S. jobs and is backed by a growing grassroots movement of millions of Americans. API was formed in 1919 as a standards-setting organization. In our first 100 years, API has developed more than 700 standards to enhance operational and environmental safety, efficiency and sustainability. Most of

The Honorable Andrew Wheeler

November 16, 2020

Page 2

our members conduct oil and gas development and production operations and, thus, will be directly impacted by this final rule.

Thank you for your consideration of this request for administrative reconsideration. We look forward to continuing to work with the Agency on improving the rule. Please do not hesitate to have your staff contact Cathe Kalisz at kaliszc@api.org (202.682.8318) if you have questions or need more information.

Sincerely,

A handwritten signature in black ink, appearing to read "Peter Tsirigotis", with a stylized flourish at the end.

Attachment

cc:

Peter Tsirigotis – USEPA

Tsirigotis.peter@Epa.gov

David Cozzie - USEPA

Cozzie.david@epa.gov

Karen Marsh – USEPA

Marsh.karen@epa.gov

Steve Fruh – USEPA

Fruh.steve@epa.gov

ATTACHMENT

API NSPS OOOOa Technical Amendments Reconsideration and Other Issues

1. EPA added a new restriction that semiannual leak detection and repair (LDAR) monitoring surveys for well sites and compressor stations must be conducted no more than 7 months apart. This added restriction was not proposed by EPA, and will make it difficult for companies with numerous affected facilities to schedule monitoring surveys.

For well sites, the final technical amendments added a restriction to §60.5397(g)(1) that semiannual LDAR monitoring surveys must be conducted no more than 7 months apart. This restriction was added to the existing restriction in the previous rule that surveys must be conducted at least 4 months apart. The additional restriction was not included in the proposed “Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Reconsideration,” published at 83 Fed. Reg. 52056 (October 15, 2018) (“Proposed Reconsideration”), nor did EPA discuss the reasoning for the additional restriction in the preamble to the Subpart OOOOa rule.

In its 2016 Request for Reconsideration, API commented on the time interval between semiannual LDAR surveys conducted in the Alaska North Slope. API believes it should be afforded the same opportunity to comment on the addition of the upper time interval of 7 months that EPA added to the final rule.

For compressor stations, along with the survey frequency being revised to semiannual, EPA revised the monitoring survey window in §60.5397(g)(2) to be consistent with well sites, that is, semiannual monitoring surveys at compressor stations. However, EPA also expanded the prior requirement for semiannual surveys to be conducted at least four months apart to also include the requirement that the surveys be no more than 7 months apart.

In the Proposed Reconsideration, EPA proposed that the surveys at compressor stations must be conducted at least 4 months apart and no more than 6 months apart, but did not include any changes relative to the timing for well sites. As EPA is aware, there are far more well sites than compressor stations and, as a result, the additional logistical burden relative to ensuring proper scheduling of surveys is not trivial, especially when one considers that there will be an ever increasing number of sites subject to surveying, growing to hundreds and thousands for many companies over time. EPA’s 2016 Regulatory Impact Analysis for Subpart OOOOa estimated that by 2025, there would be nearly 200 times as many well sites as compressor stations (190,000 vs. 960)¹.

API understands that in order for the two monitoring surveys conducted during a calendar year to accurately represent the temporal characteristics of fugitive emissions from well site and compressor station components, the surveys cannot be conducted too close together (e.g., at least four months apart).

¹ <https://www.regulations.gov/contentStreamer?documentId=EPA-HQ-OAR-2010-0505-7630&contentType=pdf> (Table 6-14).

The additional 7-month restriction, ostensibly to prevent the surveys from being conducted too far apart, adds an additional constraint to when the monitoring surveys must be conducted, and this will make it much more difficult for companies with numerous affected facilities to schedule and conduct surveys.

API notes that other EPA rules, such as 40 CFR Part 60 Subpart VVa, do not include a similar upper bound on the survey interval. In fact, Subpart VVa allows monitoring to be adjusted to accommodate the source's operations. An owner or operator is permitted to monitor at any time during the specified monitoring period (e.g., year), "... provided the monitoring is conducted at a reasonable interval after completion of the last monitoring campaign." (§60.482-1a(f)(3)) For example, the rule only requires that "(w)hen monitoring is conducted semiannually (i.e., once every 2 quarters), monitoring events must be separated by at least 60 calendar days." (§60.482-1a(f)(3)(iii)).

Operators attempt to conduct surveys 6 months apart but logistically it is not always feasible to meet the timeframe. If site conditions are such that a survey cannot be done as planned and has to be rescheduled, the reschedule date may be outside of the 7-month interval. Even if the 7-month timeframe can be met in these situations, it can sometimes create operational and maintenance inefficiencies. The additional 7-month restriction may also result in scheduling problems for facilities that experience harsh winter conditions. For example, in North Dakota, the average and mean highs in December, January and February are below freezing. Surveys during these months are challenging due to safety and logistical issues. In addition, it is common for the wind speeds to be well above 25 mph in some areas, which may exceed the maximum wind speed allowed in the fugitive emissions monitoring plan and require surveys to be rescheduled. These challenges may cause a survey to be delayed, but still meet the 4-month separation and semiannual requirement. Flexibility is required to ensure that surveys can be completed safely and within the monitoring plan requirements.

2. EPA has expanded the breadth of information required to be recorded and reported in the deviation reports for all of the affected facility source types. Expanded deviation information records kept by the facility should not have to be duplicated in annual reports.

In the final OOOOa rule, EPA expanded the level of information required to be maintained in deviation records as well as required to be reported. Previously, the rule language required that a company report or keep "records of deviations". In the current rule, the level of detailed information is expanded to include "the date and time the deviation began, duration of the deviation and a description of the deviation."

In the final rule, §60.5420a(b) prescribes reporting requirements and §60.5420a(c) prescribes recordkeeping requirements for each of the affected facilities. The expanded deviation information that is required is listed in both subsections - reporting and recordkeeping. The final rule already requires that the expanded deviation information be recorded pursuant to §60.5420a(c). There is no need for all this detail be included in the annual reports required under §60.5420a(b). The detailed deviation information will be kept in the source's records and can be made available upon request by the permitting authority.

These expanded requirements are counter to EPA's stated intent to streamline implementation of the rule, including streamlining recordkeeping and recording requirements. For example, in the October 15, 2018 Reconsideration proposal (83 FR 52086), EPA expressed the desire to streamline reporting and recordkeeping requirements to reduce the burden on regulated industry, and in addition to proposing changes in these requirements, solicited additional ways to streamline reporting and recordkeeping. Then in the September 15, 2020 final technical amendments (85 FR 57409), EPA highlighted all of the requirements that were removed and revised with the objective of streamlining reporting and recordkeeping.

Additionally, the Regulatory Impact Analysis (RIA) issued with the final rule stated (P. 3-8):

"Streamlined recordkeeping and reporting requirements: This final rule amends recordkeeping and reporting requirements for well completions and fugitive emissions for well sites and compressor stations. For well completions, the number of data fields required to be recorded and reported have been reduced. For fugitive emissions, this rule includes several changes intended to streamline recordkeeping and reporting, including replacing the sitemap and observation path requirement with other procedures that ensure that all components are monitored during each survey."

The RIA does not discuss or appear to consider the additional reporting requirements relative to deviations included in the final rule.

Message

From: Mike Sommers [registrar@api.org]
Sent: 12/10/2018 2:43:34 PM
To: Wheeler, Andrew [wheeler.andrew@epa.gov]
Subject: You're Invited to API's State of American Energy 2019



The American Petroleum Institute invites you to
The 2019 State of American Energy luncheon – celebrating Generation Energy

We are in the midst of Generation Energy. More natural gas and oil is produced in the United States than any other country in the world. At the same time, U.S. carbon dioxide emissions are at their lowest levels in a generation, largely because of the growing role played by clean natural gas. Our industry is an economic engine, supporting 10.3 million jobs – to produce, deliver and refine natural gas and oil – as well as jobs associated with energy development and the personal spending of our workers.

Guided by smart policies and regulations that unleash innovation and progress, natural gas and oil are playing a powerful role in America's economic progress and will for generations to come.

Join me and industry leaders from coast to coast at the 2019 State of American Energy luncheon.

Sincerely,

MIKE SOMMERS
President and CEO, API

RSVP

BY DECEMBER 31ST

This invitation is non-transferable.



WHEN

TUESDAY, JANUARY 8, 2019
11:30 A.M.— 1:30 P.M.

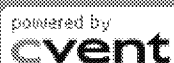
WHERE

RONALD REAGAN BUILDING AND
INTERNATIONAL TRADE CENTER
ATRIUM BALLROOM
1300 PENNSYLVANIA AVENUE, NW
WASHINGTON, DC 20004
Please use entrance on 14th Street



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This event has been designed to comply with the gifts and ethics rules of the U.S. Senate and House of Representatives as a "widely attended event." Employees of the executive branch may wish to consult their Designated Agency Ethics Official about any rules that may apply to their attendance at this event.



From: Mike Sommers [registrar@api.org]
Sent: 12/13/2019 3:09:48 PM
To: Wheeler, Andrew [wheeler.andrew@epa.gov]
Subject: You're Invited to API's State of American Energy 2020

THIS IS PROGRESS



THE STATE OF AMERICAN ENERGY

Washington has diverging views on America's energy future. Yet nearly all Americans agree that we need affordable solutions to meet growing demand for cleaner energy while addressing the risks of climate change. America's natural gas and oil is meeting this growing demand, while also fueling economic growth in communities across the country. Today the U.S. leads the world in producing natural gas and oil and in reducing U.S. emissions to their lowest levels in a generation. This is a goal that every U.S. president has articulated for the past 50 years, and it was made possible by American ingenuity, grit and technological innovation. Join us as for the 11th Annual State of American Energy as we explore America's energy progress - from a resurgence in U.S. manufacturing and American jobs to advancing environmental protections

Sincerely,



RSVP

BY DECEMBER 20th

This invitation is non transferable.

YES **NO**

WHEN

Tuesday, January 7th, 2020
11:30 a.m. — 1:30 p.m.

WHERE

The Anthem

901 Wharf St SW
Washington, D.C. 20024

MIKE SOMMERS
President and CEO, American Petroleum Institute



Parking will be limited, we suggest utilizing ride sharing services to and from the event.

This event has been designed to comply with the gifts and ethics rules of the U.S. Senate and House of Representatives as a "widely attended event." Employees of the executive branch may wish to consult their Designated Agency Ethics Official about any rules that may apply to their attendance at this event.

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From: Mike Sommers [registrar@api.org]
Sent: 12/11/2019 3:30:58 PM
To: Wheeler, Andrew [wheeler.andrew@epa.gov]
Subject: You're Invited to API's State of American Energy 2020

THIS IS PROGRESS



THE STATE OF AMERICAN ENERGY

Washington has diverging views on America's energy future. Yet nearly all Americans agree that we need affordable solutions to meet growing demand for cleaner energy while addressing the risks of climate change. America's natural gas and oil is meeting this growing demand, while also fueling economic growth in communities across the country. Today the U.S. leads the world in producing natural gas and oil and in reducing U.S. emissions to their lowest levels in a generation. This is a goal that every U.S. president has articulated for the past 50 years, and it was made possible by American ingenuity, grit and technological innovation. Join us as for the 11th Annual State of American Energy as we explore America's energy progress - from a resurgence in U.S. manufacturing and American jobs to advancing environmental protections

Sincerely,



RSVP

BY DECEMBER 20th

This invitation is non transferable.

YES

NO

WHEN

Tuesday, January 7th, 2020
11:30 a.m. — 1:30 p.m.

WHERE

The Anthem

901 Wharf St SW
Washington, D.C. 20024

MIKE SOMMERS
President and CEO, American Petroleum Institute



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Message

From: Events [events@cei.org]
Sent: 5/22/2019 3:22:37 PM
To: Wheeler, Andrew
[wheeler.andrew@epa.gov]
Subject: You're Invited: CEI Annual
Dinner & Reception

COMPETITIVE ENTERPRISE INSTITUTE

DINNER IS COMING

JUNE 20, 2019



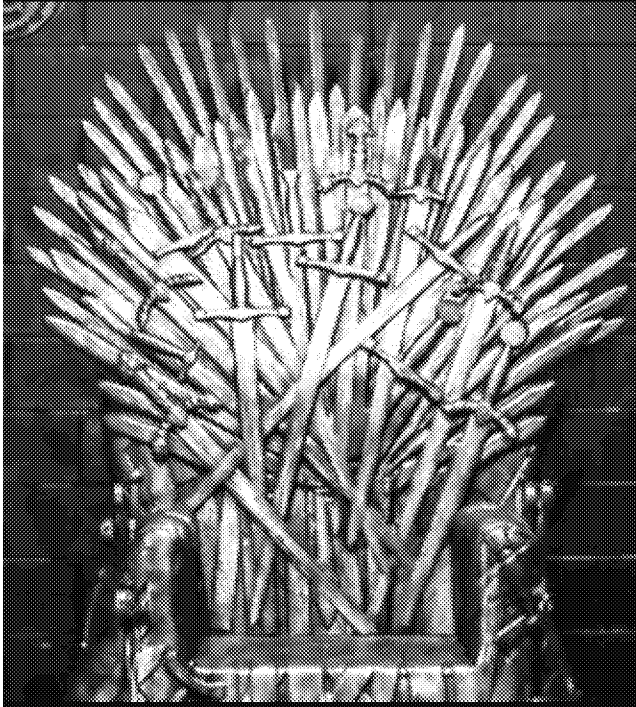
**WHEN YOU PLAY THE GAME OF PUBLIC POLICY,
YOU WIN OR FREEDOM DIES**

Dear Andrew,
The Competitive Enterprise Institute invites you to our
35th Anniversary Dinner and Reception.

Thursday, June 20, 2019
6:00 p.m. Reception
7:15 p.m. Dinner
After-party to follow

Cocktail or themed attire

Marriott Marquis
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Katherine Mangu-Ward
Reason magazine
editor in chief

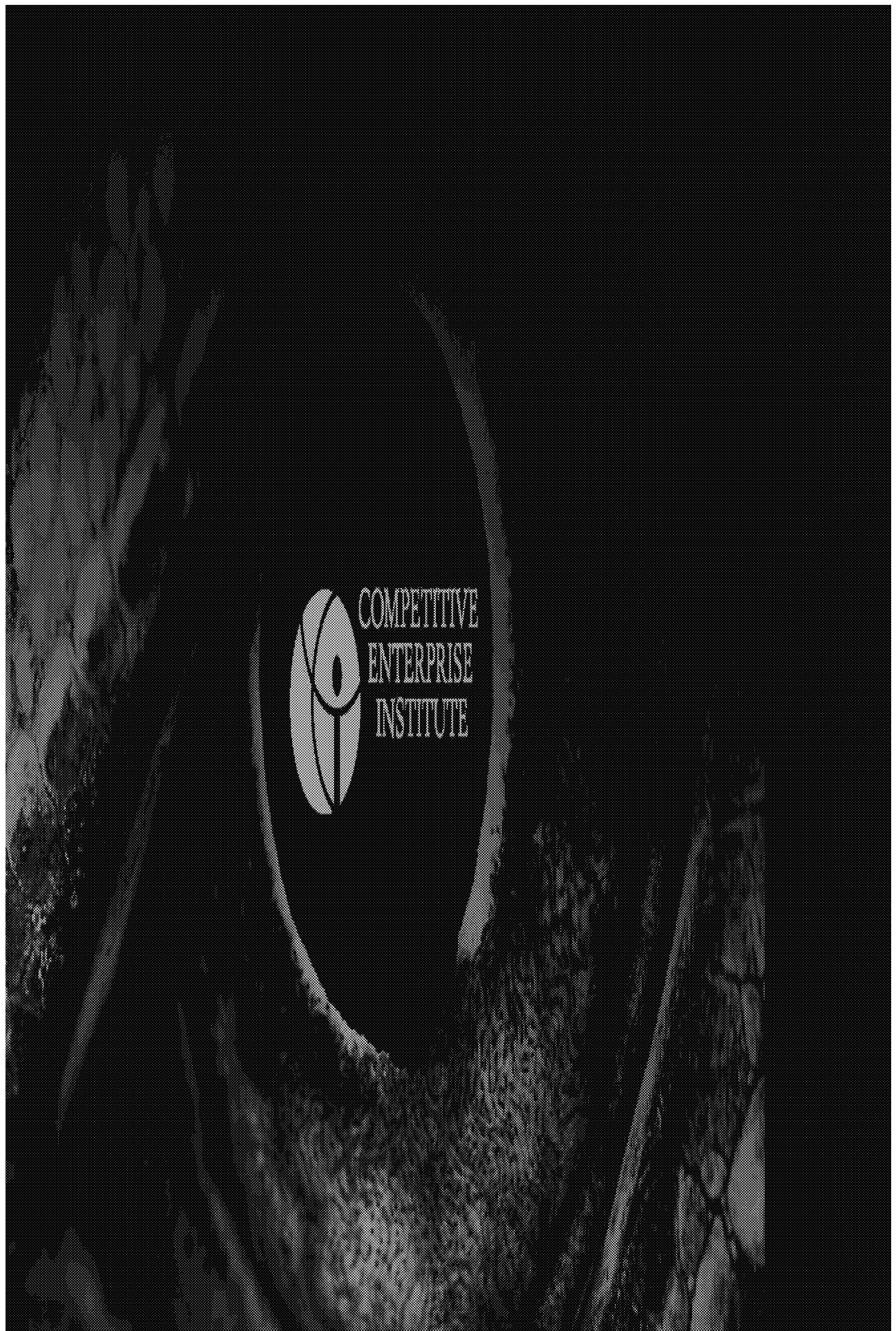
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Author, lecturer, and
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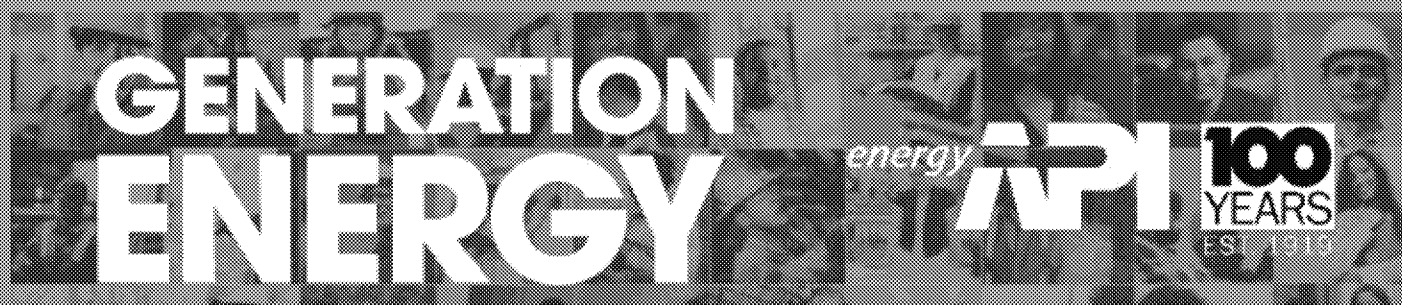
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Message

From: Mike Sommers [registrar@api.org]
Sent: 12/3/2018 3:47:14 PM
To: Wheeler, Andrew [wheeler.andrew@epa.gov]
Subject: You're Invited to API's State of American Energy 2019



The American Petroleum Institute invites you to
The 2019 State of American Energy luncheon – celebrating Generation Energy

We are in the midst of Generation Energy. More natural gas and oil is produced in the United States than any other country in the world. At the same time, U.S. carbon dioxide emissions are at their lowest levels in a generation, largely because of the growing role played by clean natural gas. Our industry is an economic engine, supporting 10.3 million jobs – to produce, deliver and refine natural gas and oil – as well as jobs associated with energy development and the personal spending of our workers.

Guided by smart policies and regulations that unleash innovation and progress, natural gas and oil are playing a powerful role in America's economic progress and will for generations to come.

Join me and industry leaders from coast to coast at the 2019 State of American Energy luncheon.

Sincerely,

MIKE SOMMERS
President and CEO, API

RSVP

BY DECEMBER 31ST

This invitation is non-transferable.



WHEN

TUESDAY, JANUARY 8, 2019
11:30 A.M.— 1:30 P.M.

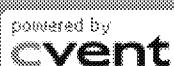
WHERE

RONALD REAGAN BUILDING AND
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Please use entrance on 14th Street



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Message

From: Events [events@cei.org]
Sent: 5/14/2019 6:28:30 PM
To: Wheeler, Andrew [wheeler.andrew@epa.gov]
Subject: You're Invited: CEI Annual Dinner & Reception

COMPETITIVE ENTERPRISE INSTITUTE

DINNER IS COMING

JUNE 20, 2019



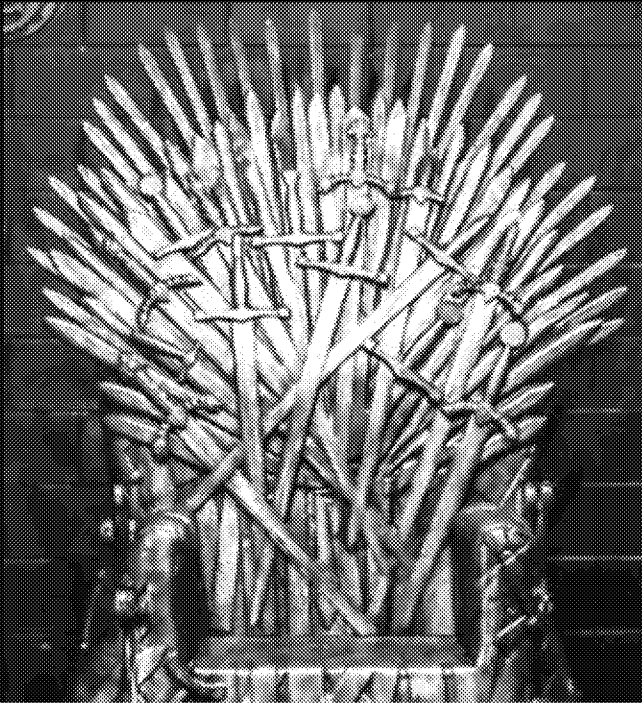
WHEN YOU PLAY THE GAME OF PUBLIC POLICY,
YOU WIN OR FREEDOM DIES

Dear Andrew,
The Competitive Enterprise Institute invites you to our 35th
Anniversary Dinner and Reception.

Thursday, June 20, 2019
6:00 p.m. Reception
7:15 p.m. Dinner
After-party to follow

Cocktail or themed attire

Marriott Marquis
901 Massachusetts Ave NW
Washington, D.C. 20001



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Kindly RSVP by June 7.
Invitation is non-transferable.
Seating is limited.

Questions: events@cei.org
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Keynote Speaker:
Dave Barry
Pulitzer Prize-winning author and
humorist

Master of Ceremonies:
Katherine Mangu-Ward
Reason magazine
editor in chief

Julian Simon Memorial
Award Winner:
Johan Norberg
Author, lecturer, and documentary
filmmaker



Often cited as one of Washington's most enjoyable events, the CEI Annual Dinner and Reception brings together an audience of policy professionals, distinguished scholars, congressional staff, and supporters to celebrate CEI's effective advocacy for freedom.

For purposes of congressional ethics rules, this is a widely attended event.



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From: Mike Sommers [registrar@api.org]
Sent: 12/13/2019 7:01:38 PM
To: Wheeler, Andrew [wheeler.andrew@epa.gov]
Subject: You're Invited to API's State of American Energy 2020

THIS IS PROGRESS



THE STATE OF AMERICAN ENERGY

Washington has diverging views on America's energy future. Yet nearly all Americans agree that we need affordable solutions to meet growing demand for cleaner energy while addressing the risks of climate change. America's natural gas and oil is meeting this growing demand, while also fueling economic growth in communities across the country. Today the U.S. leads the world in producing natural gas and oil and in reducing U.S. emissions to their lowest levels in a generation. This is a goal that every U.S. president has articulated for the past 50 years, and it was made possible by American ingenuity, grit and technological innovation. Join us as for the 11th Annual State of American Energy as we explore America's energy progress - from a resurgence in U.S. manufacturing and American jobs to advancing environmental protections

Sincerely,



RSVP

BY DECEMBER 20th

This invitation is non transferable.

YES

NO

WHEN

Tuesday, January 7th, 2020
11:30 a.m. — 1:30 p.m.

WHERE

The Anthem

901 Wharf St SW
Washington, D.C. 20024

MIKE SOMMERS
President and CEO, American Petroleum Institute



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Message

From: Howell, Mike [Mike.Howell@heritage.org]
Sent: 9/26/2019 2:20:18 PM
To: Wheeler, Andrew [wheeler.andrew@epa.gov]
Subject: Invitation to Heritage Honors Gala
Attachments: Heritage Honors Gala Invitation.pdf

Good Morning Administrator Wheeler,

The Heritage Foundation cordially invites you and a guest to our first annual Heritage Foundation Honors Gala on Tuesday, October 22, 2019 from 6:00-8:30 p.m. This black tie affair will be headlined by Vice President Mike Pence at the Marriott Marquis. We are hoping to have many other cabinet secretaries and agency heads as well. We will celebrate the unique American values that unite us as a country and pay tribute to Heritage's extraordinary founder, Edwin J. Feulner.

You can register online at www.heritagehonors.org with the invite code GALASG. This invitation is non-transferrable.

Hope to see you there,
Mike

Mike Howell
Senior Advisor, Executive Branch Relations
The Heritage Foundation
214 Massachusetts Avenue, NE
Washington, DC 20002
202-608-1545
heritage.org

THE
HERITAGE
FOUNDATION
Honors

HERITAGE PRESIDENT KAY C. JAMES
CORDIALLY INVITES YOU TO
OUR INAUGURAL GALA

*Join us as we celebrate the unique American values
that unite us as a country and pay tribute to
Heritage's extraordinary founder, Edwin J. Feulner.*



TUESDAY, OCTOBER 22, 2019

6:00 – 8:30 p.m.
(doors open at 5:30 p.m.)

MARRIOTT MARQUIS
Washington, DC

Black tie

Register online at
HERITAGEHONORS.ORG
with invite code GALASG.

*Registration for you and your guest is complimentary.
Invitation is non-transferable.*

Message

From: American Petroleum Institute [registrar@api.org]
Sent: 7/16/2018 4:31:07 PM
To: Wheeler, Andrew [wheeler.andrew@epa.gov]
Subject: RSVP Requested by July 20: Reception Honoring Outgoing API President Jack Gerard and Incoming President Mike Sommers

[View in browser](#)



No track (United States) via email (United States), please refer to the
API's 2018 Summer Edition to receive the API's 2018 Summer Edition
or API's 2018 Summer Edition to Washington DC (United States) or
API's 2018 Summer Edition to Washington DC (United States).

JULY 24, 2018
6:00 p.m. - 8:00 p.m.

NEWSEUM
835 Pennsylvania Ave. NW,
Washington, DC 20001

API's 2018 Summer Edition is a special event to honor outgoing President and
incoming President of the American Petroleum Institute (API) and to
celebrate the API's 100th anniversary.

RSVP by July 20, 2018

CONFIRMATION: 2018-07-20 11:00

You have been invited to the API Reception: A Fond Farewell & A Warm Welcome.

July 24, 2018 | 6:00 pm - 8:00 pm
Newseum

If you are having difficulties viewing the invitation, please click [here](#).

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Message

From: Hilary Moffett [moffetth@api.org]
Sent: 6/22/2018 4:44:27 PM
To: Wheeler, Andrew [wheeler.andrew@epa.gov]
Subject: NSPS Follow Up and meeting request

Hi Andrew,

Thanks for taking the time at NAM this week to chat. I had asked a question about the progress of the NSPS rulemaking (the oil and gas methane rule), and you suggested I follow up for more of a response. Are you able to have a meeting with the environmental strategy group at API? We'd love to come in and brief you on the issues that are most important to the industry. I know you've only been in for 9 weeks, but if you have 30 minutes, we'd love the chance to chat.

Thanks, again, for your time this week and I look forward to working with you.

Regards,
Hilary

Hilary Moffett
Director, Federal Relations
American Petroleum Institute
202-682-8040 (desk)
612-710-8696 (cell)
MoffettH@api.org

From: American Petroleum Institute [registrar@api.org]
Sent: 7/9/2018 3:43:04 PM
To: Wheeler, Andrew [wheeler.andrew@epa.gov]
Subject: Invitation to A FOND FAREWELL & A WARM WELCOME



A FOND FAREWELL & A WARM WELCOME

KPI RECEPTION

August 24, 2018

As their beloved students for their preparation, (classroom) as to find
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JULY 24, 2018
 8:00 p.m. - 9:00 p.m.

NEWSROOM
 505 Pennsylvania Ave NW,
 Washington, DC 20001

8:00 p.m. - 9:00 p.m.

505 Pennsylvania Ave NW,
 Washington, DC 20001

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ED_005998A_00000033-00001

Message

From: Ben Lieberman [Ben.Lieberman@cei.org]
Sent: 11/14/2018 4:53:56 PM
To: Quality [Quality@epa.gov]
CC: Wheeler, Andrew [wheeler.andrew@epa.gov]; Jackson, Ryan [jackson.ryan@epa.gov]
Subject: IQA Petition - Bristol Bay Watershed Assessment
Attachments: RFC 20181114 Bristol Bay (003) - .pdf

Enclosed is an Information Quality Act Request for Correction regarding the Bristol Bay Watershed Assessment. Do not hesitate to contact me if you need any additional information.

Ben Lieberman
Senior Fellow
Competitive Enterprise Institute
(202) 331-2270



Via E-Mail

Information Quality Guidelines Staff
Mail Code 2811 R
U.S. EPA
1200 Pennsylvania Ave., N.W.,
Washington, DC, 20460

Re: Information Quality Act Request for Correction or Withdrawal Regarding the Bristol Bay Watershed Assessment

I. Introduction

The Competitive Enterprise Institute submits this request for correction or withdrawal of information under the Information Quality Act,¹ as implemented through the Office of Management and Budget (OMB)² and the Environmental Protection Agency (EPA).³

Founded in 1984, the Competitive Enterprise Institute is a non-profit research and advocacy organization that focuses on federal regulatory policy from a pro-market perspective. We work to ensure that agency actions are rooted in statute and based on the best available evidence.

We respectfully petition EPA to either substantially correct or withdraw its 2014 Bristol Bay Watershed Assessment (BBWA)⁴ and the proposed determination based upon it.⁵ The BBWA fails the applicable standards of information quality. Its ongoing dissemination and use to effectively block the Pebble Mine project in Alaska is therefore in violation of the law.

¹ Section 515(a) of the Treasury and General Government Appropriations Act for Fiscal Year 2001, P.L. 106-554; 44 U.S.C. section 3516.

² Office of Management and Budget, "Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies," (OMB Guidelines), 67 Fed. Reg. 8452 (Feb. 22, 2002).

³ Environmental Protection Agency, "Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by the Environmental Protection Agency," (Information Quality Guidelines), at <https://www.epa.gov/sites/production/files/2017-03/documents/epa-info-quality-guidelines.pdf>.

⁴ Environmental Protection Agency, "An Assessment of Potential Mining Impacts on Salmon Ecosystems of Bristol Bay, Alaska, January 2014," (BBWA), at <https://cfpub.epa.gov/ncea/bristolbay/recordisplay.cfm?deid=253500>.

⁵ Environmental Protection Agency, "Proposed Determination of the U.S. Environmental Protection Agency Region 10 Pursuant to Section 404(c) of the Clean Water Act, Pebble Deposit Area, Southwest Alaska," (Proposed Determination), at https://www.epa.gov/sites/production/files/2014-07/documents/pebble_pd_071714_final.pdf

The BBWA was used in support of EPA’s proposed determination, which in practical effect serves as a preemptive veto of an Army Corps of Engineers’ permit under the Clean Water Act (CWA) for the Pebble Mine project. This unprecedented action—essentially rejecting a permit application prior to the permit being submitted—raises a number of legal questions, including potential violations of the Information Quality Act. As will be discussed in more detail below, this premature and speculative analysis, conducted by the agency before the relevant mine permit had been submitted and thus without knowledge of any specifics of the project being analyzed, is highly problematic under EPA’s Information Quality Guidelines. Further, the process by which the EPA initiated, compiled, and peer reviewed the BBWA contained numerous instances of bias that also fail to meet the agency’s guidelines.

For these reasons, EPA’s BBWA should, at the very least, be substantially corrected. Preferably, it should be withdrawn along with the proposed determination based upon it, and the agency should participate *de novo* in the far more rigorous and inclusive Environmental Impact Statement (EIS) process under the National Environmental Policy Act (NEPA), a process that is presently underway.⁶

II. Background

A. The Information Quality Act

Reflecting both the Information Quality Act and OMB guidelines, EPA’s Information Quality Guidelines require that “disseminated information should adhere to a basic standard of quality, including objectivity, utility, and integrity.”⁷ The agency further explains that utility “refers to the usefulness of the information to the intended users,” and that objectivity “focuses on whether the disseminated information is being presented in an accurate, clear, complete, and unbiased manner, and as a matter of substance, is accurate, reliable, and unbiased.”⁸ The BBWA must comply with these guidelines.

In addition, the BBWA must meet the “higher degree of quality” required for Highly Influential Scientific Assessments,⁹ which the agency has agreed would apply to this document.¹⁰ Thus, the agency’s guidelines also require that:

- (A) The substance of the information is accurate, reliable and unbiased. This involves the use of:

⁶ U.S. Army Corps of Engineers, “Pebble Project EIS: Draft Scoping Report,” July 25, 2018, at <https://www.pebbleprojecteis.com/>.

⁷ Information Quality Guidelines, p. 3.

⁸ *Ibid.*, p. 15.

⁹ *Ibid.*, p. 20.

¹⁰ See, “Notice of the Peer Review Meeting for EPA’s Draft Report Entitled An Assessment of Potential Mining Impacts on Salmon Ecosystems of Bristol Bay, AK,” July 6, 2012, at <https://www.federalregister.gov/documents/2012/07/06/2012-16441/notice-of-the-peer-review-meeting-for-epas-draft-report-entitled-an-assessment-of-potential-mining>.

- (i) the best available science and supporting studies conducted in accordance with sound and objective scientific practices, including, when available, peer reviewed science and supporting studies; and
- (ii) data collected by accepted methods or best available methods (if the reliability of the method and the nature of the decision justifies the use of the data).¹¹

In so doing, the agency must apply a “weight-of-evidence” approach to highly influential information, which “considers *all relevant information* and its quality, consistent with the level of effort and complexity of detail appropriate to a particular risk assessment” (emphasis added).¹²

EPA’s Information Quality Guidelines also incorporate the agency’s peer review requirements as set out in its Peer Review Handbook.¹³ These apply to “major scientifically and technically based work products (including scientific, engineering, economic, or statistical documents) related to Agency decisions,”¹⁴ such as the BBWA and proposed determination.

B. The NEPA Process and the Pebble Mine

Section 404 of the CWA specifies that the Secretary of the Army is responsible for issuing any required permits to discharge dredged or fill material into navigable waters that are associated with a project.¹⁵ This task is undertaken by the Army Corps of Engineers as part of the EIS compiled under NEPA. This process is highly exhaustive and inclusive, relying on an extensive project analysis that is reviewed by all interested parties through numerous public comment periods (and responses to comments) as well as public meetings.

As part of this process, the statute authorizes the EPA, pursuant to subsection 404(c), to deny any such permit for any area defined as a disposal site, based on criteria set out in statute.¹⁶ It has long been understood that the 404 permit process, including the EPA’s permit veto authority, would be exercised concurrently with the larger NEPA process and not as something outside of it, and that the process would begin after a permit application had been submitted and end before the NEPA process is complete and a permit has been issued.

This decades-long practice was upset by the Obama administration EPA. In two instances, the agency effectively vetoed CWA permits independently of the NEPA process—one a prospective veto before the NEPA process had commenced and another after the NEPA process had been completed and the project approved.¹⁷ In this petition, we will focus on the former—the case of the Pebble Mine.

¹¹ Information Quality Guidelines, p. 22.

¹² *Ibid.*, p. 21.

¹³ *Ibid.*, p. 11.

¹⁴ *Ibid.*

¹⁵ Clean Water Act, Section 404, at <https://www.law.cornell.edu/uscode/text/33/1344>.

¹⁶ Environmental Protection Agency, Section 404 Permit Program, at <https://www.epa.gov/cwa-404/section-404-permit-program>.

¹⁷ See, House Energy and Commerce Committee, “Major Projects Major Problems,” September 14, 2014, pp. 6-7, at <https://archives-energycommerce.house.gov/sites/repUBLICANS.energycommerce.house.gov/files/analysis/20140915MajorProjectsMajorProblems.pdf>.

The Pebble Mine has the potential to be America's largest new mine in decades, producing copper, molybdenum, and gold, creating thousands of jobs in an economically depressed area. It would be located in the Bristol Bay region in Alaska on land that has been granted by the federal government to the state of Alaska for the express purpose of mineral development. The project developer, Pebble Limited Partnership (PLP), was in the process of preparing a detailed permit application under CWA section 404 as part of the larger EIS process under NEPA.

C. EPA's Proposed Determination

In a move EPA internally admitted has “never been done before in the history of the CWA,”¹⁸ the agency issued a proposed determination that effectively vetoed any such permit before it had been submitted.¹⁹ EPA's notice of proposed determination was based on the agency's BBWA. EPA has refused to withdraw the BBWA and proposed determination even though the actual permit application has now been filed and the conventional NEPA process is underway.

The BBWA violates the relevant federal standards for information quality. First and foremost, no analysis can meet these standards if conducted without knowing the details being analyzed. In this case, the BBWA focused on and then rejected three hypothetical mine scenarios—not the actual mine proposal, which did not yet exist. In addition, every step in the process of developing the BBWA was fraught with examples of the biases that the Information Quality Guidelines seek to prevent.

III. The BBWA and Proposed Determination Violate the Information Quality Act

A. EPA's Preemptive Analysis on Its Face Violates the Information Quality Provisions and Was Criticized by Key Participants

Because the Pebble Mine was subject to a preemptive veto, the analysis on which EPA relied was unavoidably deficient. No mine permit application had yet been submitted, so EPA was analyzing its own hypothetical mine scenarios without knowing the actual terms of the Pebble Mine proposal, including measures to mitigate potential environmental impacts.²⁰ Such a premature and speculative analysis cannot possibly comply with the Information Quality Guidelines, and in particular its requirement of utility as measured by the “usefulness of the

¹⁸ House Committee on Oversight and Government Reform (OGR), “The U.S. Environmental Protection Agency's Unprecedented 404(c) Action in Bristol Bay, Alaska,” (OGR Report), November 4, 2105, p. 5, at <https://oversight.house.gov/wp-content/uploads/2015/11/Bristol-Bay-Pebble-Mine-Staff-Findings-Nov-2015-Final.pdf>.

¹⁹ See, 33 C.F.R. 323.6(b)

²⁰ EPA asserts that it has based two of these hypotheticals on preliminary PLP filings concerning the project. BBWA ES-10. However, in addition to being preliminary and possibly outdated, these documents also leave many details unaddressed, so the agency engaged in significant gap filling. For example, the agency assumes that conventional mining practices would be used rather than state-of-the art practices. BBWA ES-10-12.

information to the intended users.”²¹ It also fails the test of being “accurate, reliable and unbiased,” and “the best available science,” as is required of highly influential information.²²

Two of the agency’s three speculative mine scenarios were unrealistically massive—strawmen to be knocked down under the CWA’s requirements. The third scenario was more realistic but still very different than what PLP asserted it was planning to submit (and indeed quite different than the actual permit application that has since been submitted). The BBWA itself concedes that “[t]he scenarios are not mine plans: they are not based on a specific mine permit application and are not intended to be the detailed plans by which the components of a mine would be designed.” Further, the BBWA states that “[t]he exact details of any future mine plan for the Pebble deposit or for other deposits in the watershed will differ from our mine scenarios.”²³ Essentially the EPA stacked the deck with hypothetical mine scenarios highly unlikely to get a permit. It was on these hypothetical mine scenarios that the BBWA was based.

One BBWA peer reviewer noted that “because of the hypothetical nature of the approach employed, the uncertainty associated with the assessment, and therefore the utility of the assessment, is questionable.”²⁴ Another said that “[t]here are both technical and process issues that must be addressed before this risk assessment can be considered complete or of sufficient credibility to be the basis for a better understanding of the impacts of mining in the Bristol Bay watershed.”²⁵ Needless to say, an assessment replete with hypothetical and/or missing details fares poorly under the Information Quality Guidelines, particularly as it relates to being “accurate,” “reliable,” and “complete.”²⁶ It also falls well short in “the usefulness of the information to the intended users.”²⁷

EPA staff assured these and other peer reviewers that the BBWA is “intended as a background scientific document rather than a decision document.”²⁸ Thus, the agency essentially conceded that the analysis was too premature and incomplete to be useful for decision-making purposes. Nonetheless, the agency engaged in bait and switch, allaying peer reviewer concerns about the utility of the BBWA by saying that it would not be a decision document but later using it for precisely that purpose.

The State of Alaska raised similar concerns. One state official noted in a letter that “if EPA deems a review under Section 404(c) of the Clean Water Act is needed, that review should be conducted in conjunction with a pending permit application where actual activities and potential disposal sites are clearly specified, not in the abstract as it will be in this assessment process.”²⁹ That same official later concluded that the BBWA “would have much more scientific

²¹ Information Quality Guidelines, p. 15.

²² *Ibid.*, p. 22.

²³ BBWA, pp. 6-1.

²⁴ Environmental Protection Agency, “Final Peer Review Report: External Peer Review of EPA’s Draft Document,” (Final Peer Review Report), September 17, 2012, p. 22.

²⁵ Environmental Protection Agency, “Peer Review Follow-On Comments on the April 2013 Draft of An Assessment of Potential Mining Impacts on Salmon Ecosystems of Bristol Bay, Alaska, 2013,” p. 34.

²⁶ Information Quality Guidelines, p. 15.

²⁷ *Ibid.*

²⁸ Environmental Protection Agency, “Response to Peer Review Comments, May 2012 and April 2013 Drafts,” (Response to Peer Review Comments), p. 35.

²⁹ Letter from Tom Crafford, Director, Office of Project Management and Permitting, Alaska Department of Natural Resources, to Richard Parkin, EPA, Aug. 8, 2011.

credibility within the context of an actual defined proposal.”³⁰ The Alaska Attorney General and other state officials concluded that “the watershed assessment, and now the proposed determination which relies on the assessment, draw speculative conclusions about potential impacts from a hypothetical mine.”³¹ Impacted state governments usually play a very important role contributing information to the project approval process, but Alaska was largely bypassed in this case.

The Army Corps of Engineers—statutorily the lead agency on CWA permits under section 404—flatly declined to participate in EPA’s process of developing the BBWA, informing the agency that “at this time, the Corps has not received a permit application for this project and is therefore unable to evaluate the impacts of potential discharges associated with the Pebble Deposit.”³² The Corps further explained that it “has not yet begun the public interest review and evaluation process, and it would be premature to submit any information for the record at this time.”³³ It is unheard of for a *de facto* final decision to be made on such a project permit without participation from the Army Corps of Engineers.

Thus, several BBWA peer reviewers, the State of Alaska, and the Army Corps of Engineers all raised serious doubts about the utility of EPA’s premature and speculative exercise.

Beyond the potential for mischaracterization and exaggeration of the scope of the mine, the BBWA also failed to include the full range of mitigation measures that would have been specified in the permit application. An important component of the section 404 process is the use of mitigation measures, should a project pose a risk to the health of waters and ecosystems. Absent a permit application, the EPA had no idea what these mitigation measures might entail, so the agency simply assumed there were none beyond a relative few conventional ones that the agency concluded to be inadequate. One peer reviewer, while acknowledging potential adverse environmental impacts, noted that the BBWA “did not consider whether there are any methods that could effectively minimize, mitigate or compensate for these impacts.”³⁴ Once again, the use of assumptions in the place of actual data and analysis greatly undercuts the utility of the BBWA.

For its part, the EPA conceded that the BBWA did not include all such mitigation measures, stating that “any formal determinations regarding compensatory mitigation can only take place in the context of a regulatory action. The Bristol Bay Assessment is not a regulatory action, and thus a complete evaluation of compensatory mitigation is outside the scope of the assessment.”³⁵ Thus, the agency’s response to peer reviewer concerns about the adequacy of the mitigation discussion was to acknowledge serious gaps but promise that those gaps would be filled ahead of any “regulatory action.” This proved not to be the case as the BBWA became the primary document on which the agency’s action was based.

³⁰ Letter from Tom Crafford, Director, Office of Project Management and Permitting, Alaska Department of Natural Resources, to EPA, (July 23, 2012).

³¹ Letter from Alaska Attorney General Michael Geraghty, et al., to Gina McCarthy, Administrator, EPA, and Dennis McLerran, Regional Administrator, EPA Region 10, Sept. 19, 2014.

³² Letter, Col. Christopher Lestochi, Commander, Army Corps of Engineers Alaska District, to Dennis McLerran, Regional Administrator, EPA Region 10, March 14, 2014.

³³ Ibid.

³⁴ Final Peer Review Report, p. 13.

³⁵ BBWA, Appendix J.

Coupled with EPA's equally pessimistic assumptions that a great deal of contaminants would escape from the mine, such as the assumption that fully 50 percent of waste rock leachates would enter nearby waters,³⁶ the EPA's built-in assumption of inadequate mitigation measures virtually sealed the fate of any agency 404(c) decision based upon the BBWA. But in so doing, EPA violated the requirements of the Information Quality Guidelines.

B. The Process By Which the BBWA Was Developed Violates the Information Quality Guidelines

The fact that the BBWA was an analysis of agency-generated hypothetical mine scenarios, rather than the real thing as specified in a permit application, is reason enough for it to be suspect under the Information Quality Guidelines. Such hypotheticals may be justified when they are the "best available science," but in this case EPA has not explained why it could not have waited and reviewed the actual permit application and supporting documentation once it was filed. Timing issues notwithstanding, the biased process by which EPA developed the BBWA also gives reason to reject it, especially under the Information Quality Guideline's provisions regarding objectivity.

1. Bias Throughout the Process of Developing the BBWA

The bias against the mine was evident at the very outset of the process leading to the BBWA. A 2015 House Oversight and Government Reform Committee report uncovered numerous EPA documents and actions revealing a pre-determined goal of a 404(c) veto well before the commencement of the assessment.³⁷

Several career staff, many of whom would later work on the BBWA, expressed a clear intent of stopping the mine and using 404(c) to do so. For example, EPA Region 10 employee Phil North, who later became a technical lead on the BBWA, expressed support for a mine veto beginning in 2009.³⁸ North communicated with several other EPA employees about using a preemptive veto under 404(c), frequently sending (as well as receiving) comments treating this option as a foregone conclusion.³⁹ This also included Richard Parkin, who would later become the BBWA team leader.⁴⁰

The early-stage bias also extended to the 2010 petition from several Alaska tribes that initiated the 404(c) process and the BBWA. Documents clearly show active participation by North and other self-avowed Pebble critics within the agency, including agency help in drafting the petition.⁴¹ Nonetheless, it was this petition that the agency relied upon as justification for moving forward with the assessment and doing so ahead of the actual mine permit application and standard NEPA review process. In effect, the agency was petitioning itself to unilaterally block the Pebble Mine and thus create the BBWA at issue here.

³⁶ BBWA, p. ES-30.

³⁷ OGR Report, pp. 5-18

³⁸ OGR Report, pp. 7-8. The OGR Report notes that North was uncooperative with the Committee during its investigation and that the full extent of his actions in support of a preemptive section 404(c) veto is not known.

³⁹ OGR Report, pp. 7-8, 12-13, 18-19.

⁴⁰ OGR Report, p. 5.

⁴¹ OGR Report, pp. 9-13.

There is also evidence that the agency started working on its response to the petition before the petition was even filed. This includes a paper discussing the agency's options to such a petition that was heavily slanted towards choosing the option of a 404(c) veto, including a Region 10 Aquatic Resources Unit suggestion that the mine "should be vetoed in the end."⁴²

These and other early examples of bias led the Committee to conclude that "EPA planned to halt mining activity in Bristol Bay well before receiving petitions from local tribes," and that the agency "helped draft the tribal petition that the agency later claimed to have relied on."⁴³ The evidence of agency pre-determination before the BBWA process had begun raises serious doubts that the subsequent final product meets the definition of objectivity.

2. Selective Use of Inputs in Developing the BBWA

The EPA launched its scientific assessment in February of 2011 and with it the process of deciding which data to include and which to exclude. North and his EPA colleagues—whose documented anti-mine advocacy led the agency to this assessment—served as information gatekeepers. The non-EPA contributors were no less biased. Even those with stridently anti-mine positions were not disqualified from holding the pen, such as Alan Boraas, who authored an appendix to the BBWA despite having written op-eds with titles like "Murkowski Risks Salmon for Gold Mine," in which he suggested that the mine would result in "a little mercury in your wild salmon...."⁴⁴ Not surprisingly, nearly all of the information relied upon can be traced back to individuals and organizations opposed to the mine.

There was also bias in EPA outreach. Environmental groups and individuals opposed to the mine had substantial access to EPA officials and others involved in developing the BBWA, while mine officials and other potential supporters were largely excluded. Similarly, Alaskan tribes opposing the mine met with then-EPA Administrator Lisa Jackson while tribes supporting the mine were denied a similar meeting.⁴⁵

Anti-mine groupthink was pervasive among the BBWA contributors, but perhaps the most troublesome example was Ann Maest, a mine critic who contributed multiple studies and repeatedly conferred with other contributors to the BBWA. Maest was forced to admit that she had engaged in multiple instances of fraud in her capacity as an expert witness in the case of *Donziger v. Chevron Corp.*, in which Chevron was accused of causing large-scale environmental pollution at a facility in Ecuador.⁴⁶ In response, EPA staff excised all direct references to her work but did not attempt to remove her substantive contributions to the BBWA.⁴⁷

⁴² Environmental Protection Agency, "Options for EPA Involvement In Mining Activity In The Bristol Bay Watershed," 2010, p. 7.

⁴³ OGR letter to EPA Administrator Gina McCarthy (OGR Letter), November 4, 2015, p. 2, <https://oversight.house.gov/wp-content/uploads/2015/11/2015-11-04-IC-CL-II-to-McCarthy-EPA-Bristol-Bay-due-11-18.pdf>.

⁴⁴ See Alan Boraas, "Murkowski Risks Salmon for Gold Mine," Anchorage Daily News, Dec. 1, 2005.

⁴⁵ OGR Report, p. 16.

⁴⁶ Witness Statement of Ann Maest, *Chevron Group v. Donziger*, Case No. 1:11-cv-00691-LAK, Dkt. 1007-1 (S.D.N.Y. Apr. 12, 2013).

⁴⁷ Response to Peer Review Comments, pp. 49-50.

As discussed previously, several reviewers had raised the issue of the hypothetical and speculative nature of the analysis and the inadequacies of the discussion about mitigation. The EPA did not address these concerns, except to say that the BBWA was not a decision document, and that the agency would address these and other outstanding issues in a future regulatory proceeding.⁴⁸ That did not turn out to be the case.

Conspicuously absent from consideration was the large body of work intended to be part of the exhaustive EIS process under NEPA conducted for PLP by a range of experts.⁴⁹ The EPA has not provided any justification why the agency excluded this data. While the Information Quality Act's focus is on preventing the use of poor quality data, agencies also thwart its goals by failing to use potentially good data, as appears to be the case here. Of course, this excluded data must meet the same information quality standards as any other relied upon by the EPA, but there is no indication that the agency made any determination that it did not. As a result of this exclusion, many important details about the mine were never considered by EPA staff in the development of the BBWA, such as the extensive analysis of potential environmental mitigation measures conducted by a number of consultants for PLP.⁵⁰

Thus, at least some of the "best available science" was likely absent from the BBWA, and the record was far from "unbiased" and "complete." Further, given the requirement under the weight-of-evidence approach to consider "all relevant information," the EPA violated its information quality provisions applicable to highly influential information by categorically excluding this extensive analysis.

The one-sided nature of the inputs to the BBWA led the House Committee on Oversight and Government Reform to conclude that the EPA "failed to conduct an impartial, fact-based review of the proposed Pebble Mine..."⁵¹

3. Limited Peer Review throughout the BBWA Process

Throughout the development of the BBWA, the EPA engaged in a process it called peer review, but simply calling it that does not comply with EPA's Peer Review Handbook, which the agency incorporated into its Information Quality Guidelines.⁵² At several stages, EPA staff limited opportunities for public participation, particularly after greatly expanding the BBWA draft midway through the process. EPA also improperly interfered with peer reviewers on numerous occasions,⁵³ which the agency itself documented in its Final Peer Review Report.⁵⁴

Despite a limited peer review process, reviewers raised a number of objections. For example, one reviewer said that "some of the comments read like editorial opinions rather than

⁴⁸ Response to Peer Review Comments, pp. 31, 35, 39, 47, 111, 114-115, 165.

⁴⁹ See, Pebble Limited Partnership, Environmental Baseline Document, <https://pebbleresearch.com/document/>

⁵⁰ PLP, "Comments of the Pebble Limited Partnership on EPA Region 10's Proposed Determination Pursuant to Section 404(c) of the Clean Water Act Regarding the Pebble Deposit Area, Southwest Alaska," September 19, 2014, pp. 40-46.

⁵¹ OGR Letter, p. 1,

⁵² Information Quality Guidelines, p. 11.

⁵³ EPA Peer Review Handbook, 4th ed., 2015, at 86, at <https://www.epa.gov/osa/peer-review-handbook-4th-edition-2015>.

⁵⁴ Final Peer Review Report, pp. 3-4.

reporting scientific results.”⁵⁵ Another said “the report lacks impartiality.”⁵⁶ These and other peer reviewer concerns were largely dismissed by the agency.

IV. Recommendation of Corrective Action

For the reasons stated above, the BBWA is in need of numerous corrections, and the proposed determination should be revised to reflect the corrected BBWA. However, given the number and extent of Information Quality Guidelines failures, the best course of action would be for the EPA to withdraw the BBWA and proposed determination in their entirety and instead participate *de novo* in the ongoing Army Corps of Engineers-led EIS process under NEPA. In other words, the information quality provisions are best served by the EPA going back to participating in the process way it had done for decades.

This option still gives the EPA the opportunity to weigh in on the Pebble Mine, only this time the agency would have before it a specific permit application showing exactly the details of the proposed project, including mitigation measures. The EPA would also have the benefit of full participation from the Army Corps of Engineers, other federal agencies, the State of Alaska, and other interested parties who had limited or no input in the development of the BBWA. The agency would also have access to a much larger body of research and analysis from which to judge the project.

The State of Alaska, while describing EPA’s BBWA and proposed determination as “premature, speculative, without precedent, illegal in terms of both process and substance, and unnecessary,” stated that “a more appropriate alternative... would be to announce EPA’s concerns so they could inform the [NEPA] permitting process and wait to see if EPA’s concerns are adequately addressed through the permitting process, with due deference to the regulatory criteria, expertise, and experience of other agencies with jurisdiction in the specific subject matter.”⁵⁷

Indeed, for purposes of the information quality requirements, the EIS process will be everything that the BBWA was not—a comprehensive, inclusive, and extensively vetted analysis of the Pebble Mine project as proposed. This option would also further the Competitive Enterprise Institute’s goal of federal agency actions rooted in the law and based on the best available evidence.

It is important to emphasize that in the course of the EIS process, the EPA would still have the opportunity to make its own determination under 404(c), but now that determination would be a well-informed one rather than one based on the speculative, premature, and likely-biased BBWA. Regardless of the outcome of this more rigorous and extensive permitting process, it would better comport with the Information Quality Act than the BBWA.

⁵⁵ Environmental Protection Agency, “Final Peer Review Summary Report: External Peer Review of Wobus et. al,” 2012, p. 4.

⁵⁶ Environmental Protection Agency, “Final Peer Review Summary Report: External Peer Review of Chambers and Higman,” 2012, p. 16.

⁵⁷ Letter from Alaska Attorney General Michael Geraghty, to Dennis McLerran, Regional Administrator, EPA Region 10, April 29, 2014.

Respectfully Submitted,

Ben Lieberman

Senior Fellow

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Ben Lieberman will also serve as an organizational point of contact for this request.

Message

From: Ben Lieberman [Ben.Lieberman@cei.org]
Sent: 3/21/2019 3:59:14 PM
To: Wheeler, Andrew [wheeler.andrew@epa.gov]
Subject: FW: Follow-up letter to EPA on Nov 14 petition
Attachments: Lieberman 20190320 Wheeler Bristol Bay letter.pdf



March 20, 2019

Andrew Wheeler
Administrator
United States Environmental Protection Agency
Washington, D.C. 20460

Re: Request for Correction Number 19001 Pertaining to the Bristol Bay Watershed Assessment

Dear Administrator Wheeler:

On November 14, 2018, the Competitive Enterprise Institute filed a Request for Correction regarding the Environmental Protection Agency's Bristol Bay Watershed Assessment (BBWA) and consequent agency action rejecting the Pebble Mine project in Alaska. As discussed in the request, the BBWA fell well short of the standards set out in the Information Quality Act and your agency's implementing guidelines. We believe the best course of action for the agency would be to withdraw this highly flawed assessment and rescind the use of it to veto the Pebble project.

We noted in particular that the data-gathering process for the BBWA was inherently flawed in that no permit application for the Pebble Mine had yet been submitted. For this reason, EPA's analysis was based on its own guess of what a future application might look like. We also noted that important stakeholders, including the State of Alaska, complained that they had limited input into the BBWA process. Similarly, the Army Corps of Engineers, statutorily the lead agency on such permit applications, declined to participate on the grounds that without a permit application any analysis would be premature and speculative. We also detailed the selective use of inputs and expertise in developing the BBWA as well as numerous instances of bias. Overall, there were both substantive and process flaws to the BBWA that made it suspect under the Information Quality Act.

We concluded our Request for Correction by noting that the Army Corps of Engineers had begun its far more robust and comprehensive review of the Pebble Mine based on the actual permit application. Indeed, EPA's pre-emptive veto represented the first and only time the agency took such action prior to an Army Corps of Engineers' permit review. Notwithstanding EPA's efforts towards circumventing the process, the Army Corps has continued its work and has now reached the important stage of introducing a detailed Draft Environmental Impact Statement (DEIS) and opening it up to comment by all interested parties. Thus far, this process is proving itself to be everything the BBWA was not – timely, inclusive, exhaustive, and completely data-driven. As such, it comports well with the requirements of the Information Quality Act.

It should also be noted that, regardless of the status of the BBWA, EPA will have every opportunity to participate in the process now being led by the Army Corps of Engineers, beginning with agency comment on the DEIS. Furthermore, once the DEIS is finalized EPA will



have the opportunity to consider exercising its veto authority over the project. However, in sharp contrast to the agency's previous veto based on the BBWA, this decision would be a much better informed one based on a more comprehensive record and higher quality data. The continued existence of the flawed BBWA as EPA's official position on the Pebble Mine can only undercut this process.

For these reasons, we again respectfully request the agency to create a clean slate by promptly withdrawing its BBWA and veto of the Pebble Mine, and instead participate in the Army Corps process now underway. Thank you.

Respectfully Submitted,

Ben Lieberman
Senior Fellow
ben.lieberman@cei.org
202-331-1010

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Washington, DC 20005

Message

From: Ben Lieberman [Ben.Lieberman@cei.org]
Sent: 9/25/2019 5:08:35 PM
To: Wheeler, Andrew [wheeler.andrew@epa.gov]
Subject: RFC 19001 Re Pebble Mine BBWA
Attachments: BBWA-9-26-2019.pdf

September 25, 2019



Katherine Chalfant
Acting Director
Enterprise Quality Management Division
Office of Enterprise Information Programs
U.S. Environmental Protection Agency
Washington, DC 20460

Re: Request for Correction 19001 and Request for Reconsideration 19001A Pertaining to the
Bristol Bay Watershed Assessment

Dear Acting Director Chalfant:

Your most recent letter regarding the Competitive Enterprise Institute's Request for Correction of the Bristol Bay Watershed Assessment (BBWA) both denies the request and appears to have initiated an appeal on our behalf with a deadline of December 30, 2019, to respond. With this letter, we wish to formally request such an appeal and provide our reasoning for it.

By way of background, CEI first filed its Request for Correction of the BBWA on November 14, 2018 – more than ten months ago. We also requested that the agency withdraw its 2014 Proposed Determination regarding the Pebble Mine in Alaska, which was based on the BBWA. The latter step was undertaken by EPA on July 30, 2019, after which we received a letter dated August 15 from Chief Information Officer Vaughn Noga. But instead of responding to the substance of our request, this letter asserted that the withdrawal of the Proposed Determination renders the Request for Correction moot. In response, we wrote an August 29 letter to Mr. Noga specifying that, since the BBWA itself has not been withdrawn, we wish to continue pursuing the Request for Correction, which prompted your latest letter initiating the appeals process.

It is worth emphasizing that EPA's Information Quality Guidelines apply to "disseminated information" and requires that such information "should adhere to a basic standard of quality, including objectivity, utility, and integrity." As of this writing, the entire BBWA, including the Executive Summary and all three volumes, remains on EPA's website. Indeed, EPA has given the BBWA a separate page, which among other things informs us that "EPA developed this assessment to better understand the Bristol Bay watershed and its resources," and that "EPA will use the assessment to inform future decision making."

Given the BBWA's prominent place on EPA's website, it continues to be disseminated by the agency and thus is still subject to the Information Quality Act. It should not take until the December 30th deadline to determine so. In any event, we believe that in the interim the BBWA should carry a label prominently identifying it as under review according to the Information Quality Act.

EPA might contend that the withdrawal of the Proposed Determination means that the BBWA is no longer influential information subject to additional scrutiny under the Information Quality Act. Even under this approach, however, the report would not be exempt from the standard level of review. However, we would also disagree with this assertion, since the BBWA still meets the Office of Management and Budget's definition of influential information as that likely to have "a clear and substantial impact on important public policies...." Most notably, the BBWA is prominently and repeatedly cited by the Department of the Interior in its participation in the Army Corps of Engineers' ongoing review of the project under the National Environmental Policy Act. This includes a July 25, 2019 letter from Interior, under section 404(q) of the Clean Water Act, which refers to the BBWA in asserting that the project will have unacceptable impacts and recommending to the Army Corps that a permit should not be issued.

The BBWA's flaws are every bit as relevant today as they were when we filed our Request for Correction. It remains an unacceptably speculative document, as it was compiled before a mine permit application had been filed with the government and thus analyzed purely hypothetical scenarios. It is also very selective in its inclusion of expert contributors and source documents skewed heavily against the mine. In contrast, the Army Corps' review process is underway, is based on the details of the actual permit application, and is inclusive, interactive, and data-driven. Overall, the Army Corps process better complies with the Information Quality Act than the BBWA. Nonetheless, the actions of the Army Corps continue to be influenced by the BBWA.

CEI continues to insist upon the substantive review of the BBWA based upon the Information Quality Act violations set out in our original Request for Correction, and we do not believe any further delays are justified.

As always, do not hesitate to contact me if you have any questions.

Respectfully submitted,

Ben Lieberman
Senior Fellow
ben.lieberman@cei.org
(202) 331-1010

Competitive Enterprise Institute
1310 L Street, 7th Floor
Washington, DC 20005

Message

From: Ben Lieberman [Ben.Lieberman@cei.org]
Sent: 6/27/2019 3:54:55 PM
To: Wheeler, Andrew [wheeler.andrew@epa.gov]; Bolen, Brittany [bolen.brittany@epa.gov]; Holloman, Vincia [Holloman.Vincia@epa.gov]; gordon.stephen@epa.gov
Subject: Emailing: Pebble-WheelerFinalLetter-6-27
Attachments: Pebble-WheelerFinalLetter-6-27.pdf



June 27, 2019

The Honorable Andrew Wheeler
Administrator
United States Environmental Protection Agency
Washington, DC 20460

Re: November 14, 2018 Request for Correction Number 19002 Pertaining to the Bristol Bay Watershed Assessment

Dear Administrator Wheeler:

On November 14, 2018, the Competitive Enterprise Institute filed a Request for Correction (RSC) regarding the Environmental Protection Agency's Bristol Bay Watershed Assessment (BBWA) and consequent agency action that effectively rejected the Pebble Mine project in Alaska. As discussed in the request, the BBWA fell well short of the standards set out in the Information Quality Act and your agency's implementing guidelines. What made this request fairly unique is that your agency compiled the BBWA and used it to reject the project before the Army Corps of Engineers had commenced its far more rigorous Environmental Impact Statement (EIS) process pursuant to law under the National Environmental Policy Act (NEPA). In other words, EPA's actions pre-empted a process that conforms much more closely to the requirements of the Information Quality Act.

On March 20, 2019, we sent you a letter reiterating our strong interest in resolving this issue, especially in light of the fact that the Army Corps of Engineers' assessment of the Pebble Mine project was now underway. That assessment is indeed proving itself to be everything the BBWA was not in terms of meeting both the procedural and substantive requirements of the Information Quality Act. Nonetheless, the NEPA process may be derailed by EPA's actions prejudging the outcome and potentially rendering it moot.

The most recent communications from your agency regarding CEI's request were a February 13, 2019 letter promising to respond to the petition by June 21, 2019, followed by another letter dated June 20, 2019 stating that an unspecified additional amount of time will be needed. This is unacceptable. We now reiterate our strong interest in the immediate resolution of this matter.

We would also note that on April 24, 2019, The Office of Management and Budget issued a Memorandum, "Improving Implementation of the Information Quality Act." This administration-wide Memorandum included the procedural requirement that "agencies will not

take more than 120 days to respond to an RFC without the concurrence of the party that requested the request for correction.” This deadline has long passed and CEI has no intention of agreeing to an extension.

In addition, it is worth noting that several of the substantive reforms in the Memorandum, especially those requiring the disclosure of underlying assumptions and the accurate characterization of probabilities and uncertainties, further underscores that the BBWA fails under the Information Quality Act and is out of step with the Trump administration’s stated priorities.

We urge you to adhere to both the deadlines and the substance of the Memorandum by immediately withdrawing the BBWA.

Respectfully Submitted,

Ben Lieberman
Senior Fellow
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(202) 331-1010

Competitive Enterprise Institute
1310 L Street NW, Seventh Floor
Washington, DC 20005

Message

From: Ben Lieberman [Ben.Lieberman@cei.org]
Sent: 9/25/2019 5:05:53 PM
To: Wheeler, Andrew [wheeler.andrew@epa.gov]
Subject: RFC 19001
Attachments: BBWA-9-26-2019.pdf

September 25, 2019



Katherine Chalfant
Acting Director
Enterprise Quality Management Division
Office of Enterprise Information Programs
U.S. Environmental Protection Agency
Washington, DC 20460

Re: Request for Correction 19001 and Request for Reconsideration 19001A Pertaining to the
Bristol Bay Watershed Assessment

Dear Acting Director Chalfant:

Your most recent letter regarding the Competitive Enterprise Institute's Request for Correction of the Bristol Bay Watershed Assessment (BBWA) both denies the request and appears to have initiated an appeal on our behalf with a deadline of December 30, 2019, to respond. With this letter, we wish to formally request such an appeal and provide our reasoning for it.

By way of background, CEI first filed its Request for Correction of the BBWA on November 14, 2018 – more than ten months ago. We also requested that the agency withdraw its 2014 Proposed Determination regarding the Pebble Mine in Alaska, which was based on the BBWA. The latter step was undertaken by EPA on July 30, 2019, after which we received a letter dated August 15 from Chief Information Officer Vaughn Noga. But instead of responding to the substance of our request, this letter asserted that the withdrawal of the Proposed Determination renders the Request for Correction moot. In response, we wrote an August 29 letter to Mr. Noga specifying that, since the BBWA itself has not been withdrawn, we wish to continue pursuing the Request for Correction, which prompted your latest letter initiating the appeals process.

It is worth emphasizing that EPA's Information Quality Guidelines apply to "disseminated information" and requires that such information "should adhere to a basic standard of quality, including objectivity, utility, and integrity." As of this writing, the entire BBWA, including the Executive Summary and all three volumes, remains on EPA's website. Indeed, EPA has given the BBWA a separate page, which among other things informs us that "EPA developed this assessment to better understand the Bristol Bay watershed and its resources," and that "EPA will use the assessment to inform future decision making."

Given the BBWA's prominent place on EPA's website, it continues to be disseminated by the agency and thus is still subject to the Information Quality Act. It should not take until the December 30th deadline to determine so. In any event, we believe that in the interim the BBWA should carry a label prominently identifying it as under review according to the Information Quality Act.

EPA might contend that the withdrawal of the Proposed Determination means that the BBWA is no longer influential information subject to additional scrutiny under the Information Quality Act. Even under this approach, however, the report would not be exempt from the standard level of review. However, we would also disagree with this assertion, since the BBWA still meets the Office of Management and Budget's definition of influential information as that likely to have "a clear and substantial impact on important public policies...." Most notably, the BBWA is prominently and repeatedly cited by the Department of the Interior in its participation in the Army Corps of Engineers' ongoing review of the project under the National Environmental Policy Act. This includes a July 25, 2019 letter from Interior, under section 404(q) of the Clean Water Act, which refers to the BBWA in asserting that the project will have unacceptable impacts and recommending to the Army Corps that a permit should not be issued.

The BBWA's flaws are every bit as relevant today as they were when we filed our Request for Correction. It remains an unacceptably speculative document, as it was compiled before a mine permit application had been filed with the government and thus analyzed purely hypothetical scenarios. It is also very selective in its inclusion of expert contributors and source documents skewed heavily against the mine. In contrast, the Army Corps' review process is underway, is based on the details of the actual permit application, and is inclusive, interactive, and data-driven. Overall, the Army Corps process better complies with the Information Quality Act than the BBWA. Nonetheless, the actions of the Army Corps continue to be influenced by the BBWA.

CEI continues to insist upon the substantive review of the BBWA based upon the Information Quality Act violations set out in our original Request for Correction, and we do not believe any further delays are justified.

As always, do not hesitate to contact me if you have any questions.

Respectfully submitted,

Ben Lieberman
Senior Fellow
ben.lieberman@cei.org
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Washington, DC 20005

Message

From: Ben Lieberman [Ben.Lieberman@cei.org]
Sent: 8/29/2019 1:31:41 PM
To: Wheeler, Andrew [wheeler.andrew@epa.gov]
Subject: Letter Regarding Request For Correction on Bristol Bay Watershed Assessment
Attachments: BBWA-8-29-2019 (003).pdf



August 29, 2019

The Honorable Andrew Wheeler
Administrator
United States Environmental Protection Agency
Washington, DC 20460

Re: Request for Correction Number 19001 Pertaining to the Bristol Bay Watershed Assessment

Dear Administrator Wheeler:

On November 14, 2018, the Competitive Enterprise Institute (CEI) filed a Request for Correction under the Information Quality Act regarding the Environmental Protection Agency's Bristol Bay Watershed Assessment (BBWA). In that request, we also asked that your agency withdraw its 2014 Proposed Determination regarding the Pebble Mine in Alaska, which was based on the BBWA and served to effectively block the project from moving forward. On July 30, 2019, the EPA Region 10 Administrator indeed withdrew the Proposed Determination and stated that EPA will instead participate in the National Environmental Policy Act (NEPA) review of the mine currently being conducted by the U.S. Army Corps of Engineers.

In a letter dated August 15, 2019, Chief Information Officer and Deputy Assistant Administrator of Environmental Information Vaughn Noga told us that the Request for Correction is no longer necessary since the Notice of Determination has been withdrawn. While we applaud the agency for withdrawing the Proposed Determination and co-operating with the Army Corps of Engineers in its review of the Pebble Mine, we disagree that the Request for Correction is no longer necessary and reiterate our strong interest in its expeditious completion.

The Information Quality Act applies to information that is being disseminated by an agency and requires that the "disseminated information should adhere to a basic standard of quality, including objectivity, utility, and integrity." We explained in our Request for Correction how the BBWA falls well short of this standard. Although the Proposed Determination has been withdrawn, the flawed BBWA still represents EPA's position on the Pebble Mine and is still being disseminated and used as such. For example, it was relied upon by several commenters in the Army Corps of Engineers' NEPA process, including the U.S. Department of the Interior. Thus, the BBWA still falls within the scope of the Information Quality Act and our Request for Correction remains valid.

We have now been waiting more than nine months for EPA to do a substantive review of the BBWA under the Information Quality Act. In a February 13, 2019 letter to CEI, your agency pushed back its deadline to respond to June 21, but then in a June 20, 2019 letter said that the process was still ongoing and would require an unspecified additional amount of time. Now, with the August 15 letter, your agency has unilaterally and incorrectly decided that the matter is over without having conducted a review of the BBWA. It should be noted that the Office of

Management and Budget, in its April 24, 2019 Memorandum For the Heads of Executive Departments and Agencies on Improving Implementation of the Information Quality Act, set a 120-day deadline to review such requests, a deadline that EPA has far exceeded. We again ask for expeditious consideration of the Request for Correction. Thank you.

Respectfully Submitted,

Ben Lieberman
Senior Fellow
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Competitive Enterprise Institute
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Washington, DC 20005

cc: Vaughn Noga, Chief Information Officer and Deputy Assistant Administrator of
Environmental Information, Environmental Protection Agency

Matthew Leopold, General Counsel, Environmental Protection Agency

Ryan Jackson, Chief of Staff, Environmental Protection Agency

Brittany Bolen, Associate Administrator for the Office of Policy, Environmental
Protection Agency

Russ Vought, Acting Director, Office of Management and Budget

Derek Kan, Executive Associate Director, Office of Management and Budget